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Supreme Court, U.S.
FILED

03-945 DEC 24 2003

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES OF AMERICA

NICOLAS NOGUERAS CARTAGENA, Senator;
ABIGAIL MOJICA-ESCOBAR;
NICOLLE NOGUERAS-MOJICA
BERTA CARTAGENA
DANIEL MOJICA
Petitioner

v.

U.S. DEPARTMENT OF JUSTICE; US TREASURY DEPARTMENT;
INTERNAL REVENUE SERVICE;
GUILLERMO GIL-BONAR, U.S. Attorney;
JORGE E. VEGA-PACHECO
JOHN D. JOHNSON
Respondent

ON PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the Circuit Court erred in dismissing the Federal Tort Claim Act for lack of jurisdiction where no substantial progress took place in the litigation before the administrative remedies were exhausted and petitioner filed an amended complaint.

B. Whether the Court of Appeal erred in dismissing Petitioner Bivens claim against co-defendant Johnson based upon the absolute immunity doctrine when the court conceded that motion to dismiss under Rule 12 (b) (1) and 12 (b) (6) should not stand as analyzed under the qualified immunity doctrine.

C. Whether the District Court and the Court of Appeal erred as a matter of law in concluding that Petitioner failed to make specific objection to Magistrate Report and Recommendation, thus precluding appellate review.

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WRIT OF CERTIORARI

I. JURISDICTIONAL STATEMENT

A. Petitioner seeks review from judgment rendered by the Circuit Court of Appeal for the First Circuit in the case of Nicolás Nogueras Cartagena vs. United States Department of Justice et all Case No. 03-1113. This judgment was entered on September 26, 2003. This case came to be heard on appeal from the United District Court for the District of Puerto Rico.

The jurisdiction to grant this writ of certiorari to this Supreme Court is grounded in Rule No.10 and 13 of the Supreme Court of the United States and 28 U.S.C. Section 1254(1) which authorizes the review of judgements rendered by the Court of Appeals in any civil or criminal case.

B. Citation of opinions Circuit Court of Appeal 03-1113. Citation of District Court Opinion Civil 00-1778 (DPR Nov. 27, 2002)

II. STATEMENT OF MATERIAL FACTS

On April 24, 1996 an indictment was filed by the United States Attorney in the Federal District Court of Puerto Rico , charging petitioner Nicolás Nogueras Cartagena and his wife Abigail Mojica Escobar with the following offenses: conspiracy to defraud the United States by impending and defeating the IRS evaluation and collection of taxes, interest and penalties under 18 U.S.C.371, with aiding and abetting a violation of the Ethics in Government Act relating to Mr. José M. Torres Dueño, representation of the plaintiffs before the IRS on a matter in which Torres had previously participated as an IRS official, 18 U.S.C. 207(a), structuring financial transactions to avoid reporting

requirements, 31 U.S.C. 5324(a) (3), and making false statements, 18 U.S.C. 1001.

As a result of the indictment, plaintiffs were arrested in their respective residences. Plaintiff Nogueras was arrested at his home in Puerto Rico and his wife arrested at her residence in Orlando Florida. Plaintiffs allege that at the time of the arrest the United States Attorney summoned the press in advance in order to cover the arrest. They arrested him without a warrant, which arrived an hour after his arrest. He was then put into an FBI vehicle to be taken to the district court. Plaintiffs claim that the arrests had an unusual display of excessive force, which included a large number of agents with rifles as well as other weapons.

The trial started three years later. At the very outset of the trial IRS agents incurred in false statements and misrepresentation that provoked several interventions by Federal District Judge Carmen C. Cerezo. Said agents admitted that many important records necessary for Nogueras defense has been destroyed. On June 22, 1999 before the third government witness was called to testify the US Attorney formally requested the dismissal of all the criminal charges. The request for dismissal was made because the US Attorney discovered evidence as to the appeal taken by Nogueras protesting the 100% penalty, imposed by the IRS, which was the basis for initiation of the criminal prosecution.

Mr. Nogueras presented an administrative claim within the Internal Revenue Services "IRS" office to recover damages against the federal government on December 27, 1999 which was received on January 4, 2000. **See Exhibit XII page 155-161** .

In June 21, 2000, Nogueras and several other plaintiffs filed a complaint against IRS, United States of America v. United

States US. Attorney Guillermo Gil-Bonar, United States Assistant Attorney, Jorge Vega Pacheco, Special Agent John Johnson and José E.González for false arrest and malicious prosecution under the Federal Claim Act (FTCA) 28 U.S.C.1346 (b) 2671-2680. Petitioners also claimed a constitutional violation under the doctrine of ***Bivens vs. Six Unknown Agents of the Federal Bureau of Narcotics*** 403 US 388 (1971). **See Exhibit XII page 144-154**

Petitioners then filed an amended complaint again raising a cause of action pursuant to FTCA in October 18, 2000 against the United States. the prosecution, Gil-Bonar and Vega Pacheco and special FBI agent John Johnson. **See Exhibit IX page 120-136.** The claim against IRS agent José González was dismissed with prejudice. Meanwhile in October 30, 2001, IRS denied petitioner's administrative claim for money damages. **See Exhibit XIII page 162.**

Plaintiffs claim that agents from the IRS and FBI, as well as United States Attorney Guillermo Gil-Bonar and Assistant United States Attorney Jorge E. Vega Pacheco appeared before two grand juries and submitted false and erroneous information which produced the indictment against them. Plaintiff contend that said agents, should have known that the information was false and misleading and should have prevented said information from reaching the grand jury. In addition, plaintiffs argue that agent John Johnson led the grand jury to believe that Mr. Nogueras had transferred $24,000,000.00 through his computer in the Senate to off-shore banks. while knowing said information was false.

The United States filed a Motion under Rule 12 (b) 1 and 12 (b) 6, seeking the dismissal of all the claims. Magistrate Aida

Delgado recommend the dismissal of most of the claims (Nogueras vs. United States) Civil 00-1778 D.P.R. Sept. 10, 2001. **See Exhibit VI page 46-80**. The District Court adopted this recommendation, ***Nogueras vs. United States*** 172 F Supp 2d 296 (D.P.R. 2001).

On September 19, 2001, the defendant United States filed a motion for reconsideration of Magistrate judge's report and recommendation and/or renewed motion to dismiss claim. In a opinion and order filed on September 28, 2001, the court construed the motion as a renewed motion to dismiss. Subsequently, on November 30, 2001, plaintiffs filed a motion in opposition to defendant United States' renewed motion to dismiss, submitting a second amended complaint .

The other defendants moved also for dismissal on similar ground and petitioner opposed. Due to the similarities of all the motions the U.S. Magistrate considered them together.

On September 18, 2002, US Magistrate Judge Justo Arenas issued a report and recommendation dismissing the second amended complaint filed by Petitioner in its entirety. This report and recommendation was adopted by the District Court by Order dated September 26, 2002. **See Exhibit VII page 81-83**.

The Court stayed the issuance of judgment to allow petitioner to file objections to the Magistrate report and recommendation in October 21, 2002. Petitioner filed the objections to the Magistrate Recommendations. **See Exhibit VIII Page 84-119.**

On November 27, 2002 the District Court affirmed the adoption of Magistrate Report and Recommendation and judgment was entered on November 27, 2002. **See Exhibit II, page 9-15 and**

Exhibit III, page 16. Petitioner appealed from this judgment on December 17, 2002 to the Circuit Court of Appeal for the First Circuit. Upon consideration of the briefs submitted by the parties and the argument the Circuit Court of Appeal confirmed the District Court's judgment. **See Exhibit I, page 1-8.**

III. ARGUMENTS OF ISSUES PRESENTED FOR REVIEW

A. Lack of jurisdiction under Federal Torts Claims Act:

The Circuit Court of Appeals held that Petitioner claims under FTCA were completely barred because Nogueras failed to comply with statutory requirements for administrative exhaustion. The Circuit Court furthermore indicated that Nogueras did not abide by the terms of sec 2675 (a) and sued the United States in the absence of a final agency response and in less that six months after he filed the administrative claim.

The Court citing ***Mc Neil vs United States*** 508 US 106 (1993), ***Gonzalez vs United States*** 284 F3d 281 (1st Cir. 2002) and **Attallah vs United States** 955 F2d 776 (1st Cir. 1991) concluded that this failure creates an incurable jurisdictional defect.

We respectfully disagree with this ruling. A rigorous reading and analysis of these cases led to the conclusion that they are not applicable to the facts of the above captioned case.

In ***Gonzalez vs United States*** plaintiff filed a medical malpractice suit against a federal supported hospital in the Massachusetts State Court. The United States on behalf of the health care institution removed the case to the Federal District Court and then filed a Motion to Dismiss for failure to exhaust administrative remedies under FTCA. The District Court granted the motion to dismiss all claims against the United States. Plaintiff

appealed from this judgment to the Court of Appeals. As a matter of fact, at the moment of the appeal plaintiff had not filed an administrative claim within the agency.

In ***Attallah vs United States***. Plaintiffs filed a suit against United States Custom Services for the wrongful death of her spouse. The complaint was filed five year or four years later of the death occurrence. The District Court entered summary judgment against plaintiff dismissing the claims against the US government. The Circuit Court established that the complaint was timely filed since when the injury at and its causes are not immediately apparent accrual of the causes of action occurs at the time their injury is discovered or when claimant in exercise of reasonable diligence could have discovered. Notwithstanding, the Court confirmed District Court judgment on other grounds.

In both cases the Circuit Court hold that the filing of a timely administrative claim is a jurisdictional requirement that cannot be waived . Moreover in both cases the complaints were time barred since they were filed after the two year statute of limitation. In the instant case it is an undisputable fact that petitioner filed his administrative claim before the agency within the two year term provided in 28 UCA Sec 240 1 (b).

In the instant case, the Court reasoned that the District Court was without jurisdiction not because petitioner failed to file an administrative claim on time, but because the complaint was presented prematurely.

Petitioner contends that although the original complaint was filed within six month of the filing of the administrative claim, nevertheless the amended complaint filed on October 18, 2002 cured any jurisdictional defect, thus granting jurisdiction to the

District Court.

The Circuit Courts have been divided as whether prematurely filing of a complaint under FTCA deprives the Court of subject matter jurisdiction. Indeed this Supreme Court in ***Mc Neil vs US*** decided to issue the writ of Certiorari to resolve this conflict, particularly in prematurely filing when no substantial progress has taken place in the litigation before the administrative remedies are exhausted. See ***Mc Neil*** supra at 110.

But in ***Mc Neil***, this Court left open the question as to whether a consecutive complaint filed after the expiration of six (6) months, when a premature complaint was filed, precludes the dismissal of the action for lack of subject matter jurisdiction. Mc Neil supra see notes 5 and 6.

In ***Mc Neil*** plaintiff a state prisoner, presented pro se an action at Federal District Court to recover the damages (under FTCA against US Public Health Services) he suffered while he was incarcerated four months later the filed a claim before the Department of Health and Human Services. His claim was denied twenty one days latter. When plaintiff received the letter, he moved to Court to submit copy of this letter. Petitioner also asked the court to accept the letter as a proper requested to commence his legal action. See Mc Neil at 108.

The United States requested the dismissal of the action on relying of the six (6) months statute of limitation provided by FTCA. This motion was based in the assumption that the complaint has been filed on April 15, 1990 when plaintiff paid the court filing fee, and that date was more than six (6) months after the denial of plaintiff administrative claim.

The District Court dismiss plaintiff claims because it

considered the same was filed prematurely and that the letter filed before the Court could not be considered as a new complaint. The Circuit Court confirmed the District Court judgment but dissident Judge Ripple stated that plaintiff attempted to refile his legal action after he received a denial of his administrative claim.

This Court as we mentioned early did not address this issue in Mc Neil. In the case at bar petitioner filed a timely administrative claim. The complaint was filed only fifteen (15) days before the extinction of the six (6) months provided in 28 U.S.C.A. 2678 (b). Nevertheless petitioner filed an amended complaint on October 21, 2000. **See Exhibit IX Page 120-136**.

On October 2000, between the date of filing the original complaint and the date of filing of the amended complaint no substantial progress took place in the litigation before the administrative remedies were exhausted. In fact the District Court docket reflects than only a motion was filed by petitioner and order to cause was issued on October 17, 2000.

At the moment of the filing of the amended complaint none of the defendants had appeared before the District Court. The administrative claim was finally denied on October 30, 2000, without any further explanation.

According to the facts already stated we conclude that the District Court had jurisdiction to pass upon the complaint.

In ***Celestine vs. Veterans Administration Hospital***, 764 F2d 1368 (4th Cir. 1984) the District Court dismissed the complaint filed under FTCA because it was premature. Plaintiff in that case then filed an administrative case before the Veteran Administration but was denied before the Court ruled upon the motion to dismiss. The Circuit Court overruling the District Court hold that when

plaintiff files an administrative claims after filing in District Court and the claim is subsequently denied, refilling is not necessary and objections for failure to exhaust administrative remedies are moot. See Celestine supra at 1363.

In ***Kubrick vs United States*** 581 F2d 1092 (3rd Cir. 1978) also plaintiff filed an administrative claim after the filing of the federal suit. The Circuit Court adopted the same ruling as in Celestine and added that where the administrative claim is denied before any substantial progress has been made in the pending litigation the suit need not be refilled to be effective, to hold that refilling was necessary would involve duplicitous pleadings and wasted effort.

In the present case petitioner filed the administrative claim before going to Court, no progress at all was made in the litigation, and the amended complaint was filed after the expiration of the six (6) months and the US Government have not yet appeared to before the Court when the administrative claim was denied. Therefore with much more reason the exhaustion of administrative defense remedies, are moot and the District Court clearly has subject matter jurisdiction over the complaint. To hold otherwise will result in a failure of justice.

This Court should not miss the opportunity to resolve the issue left aside in Mc Neil. The material facts presented in this petition for Certiorari represent the most suitable scenario for the issuance of the writ solicited.

B. Dismissal of Petitioner's Bivens Claim under absolute immunity doctrine

The Circuit Court candidly admits that petitioner's Bivens claim against co-defendant Johnson should have survive the

motion to dismiss under the standard set forth at the Federal Courts, when construing motions under Rule 12. **See Exhibit I, Page 1-8**. Nevertheless said court affirmed the District Court ruling in regard to this claim concluding that co-defendant Johnson as alleged in the complaint was intimately associated with the judicial phase of the criminal process, therefore absolute immunity precludes petitioner to recover damages.

In Order to determine if a government official is afforded the qualified immunity protection this court has established a two prong test.

In ***Saucer vs. Katz*** 533 US 194, (2001), this Court summarized this test as follows. The First inquiry must be whether a constitutional right would have been violated on the facts alleged. Second, assuming the violation was established, the question is whether the right was clearly established.

The real dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. Saucer supra at 202.

In ***Malley vs. Briggs*** 475 US 335, 341 (1986) this Court stated the following:

"Defendants will not be immune if on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree in this issue immunity should be recognized".

In this case as the Circuit Court squarely conceded, petitioner has alleged sufficient and satisfactory material facts in the complaint that taken as true and making all the reasonable

inferences in his favor had stated a cause of action for malicious prosecution thus preventing the dismissal of the claim, under Rule 12 (b) (1) and 12 (b) (6).

The Circuit Court to avoid revising District Court upon this claim preferred to affirm the judgment by making use of prosecutorial absolute immunity doctrine. Respectfully, we considered that the Circuit Court erred and this Court should vacated this ruling.

We consider that co-defendant Johnson's willful acts were not prosecutorial but rather investigative conducted as FBI agent, the information and evidence gathered by Johnson took place before submitting the same to the Grand Jury.

Indeed Johnson's testimony at the Grand Jury reveals that he began the investigation not by order of the US Attorney, but because he received information from the office of the comptroller of the Commonwealth of Puerto Rico regarding petitioner Nogueras.

This investigation began in 1993 and was performed in conjunction with IRS officers. Johnson purposely and willfully withheld exculpatory evidences from the Grand Jury and on the contrary, led the Grand Jury to believe that the comptroller had uncovered millions of dollars belonging to petitioner and that he made transfers of this money throughout his computer to different parts of the world.

Co-defendant Johnson knew long ago before presenting the evidence recollected to the Grand Jury, that there was enough exculpatory evidence as to not proceed with the request for indictment. Furthermore nor Johnson or the IRS agents timely informed, US District Attorney Gil-Bonar, as U.S. Attorney

admitted before Judge Carmen Cerezo in the criminal proceedings held against Nogueras, of this exculpatory evidence.

The questions is, are police government official allowed to destroy evidence in criminal proceeding? Are they allowed to uncover exculpatory evidence that benefits potential defendants? Are they permitted to induce the Grand Jury or the US Attorney Office to force the issuance presentation of indictments? Are they permitted to break the law and the Constitution? The answer has to be in the negative.

Co-defendant knew as an experienced special agent for the FBI, (8 years) that his conduct was in violation of Petitioner's constitutionally protected rights, particularly article V and VI of the Bill of Rights. There is a clearly constitutional right established that protect petitioner and this right was infringed willfully by co-defendant Johnson. On the other hand it is inescapable that a competent and experienced officer on an objective basis, would have concluded that under the facts and the evidence obtained in this case the issuance of an indictment (and as a consequence the issuance of a warrant of arrest) was not only inappropriate, but also illegal.

Consequently, co-defendant's acts should not be considered prosecutorial in nature, and absolute immunity must be disregarded. Instead this court should remand this cause of action to the District Court, as the Motion to dismiss under Rule 12 (b) (1) and 12 (b) (6) could not stand.

C. Petitioner failure to make specific objections to Magistrate Report and Recommendation as to preclude his Right for review or appeal.

Both the District Court and the Court of Appeal ruled that

petitioner have failed to satisfy the requirement of the US Magistrate Recommendation by not addressing the report and recommendation specific portions to be objected.

The Circuit Court based its ruling in ***Thomas vs. Arn*** 474 US 140 (1985), ***Henley Drilling Co vs. Mc Gee*** 36 F3d 143 (1st Cir. 1994) and ***United States vs. Valencia Copete*** 792 F2d 4 (1st Cir. 1898). But in those cases the facts were quite different because plaintiff did not file an objection to the US Magistrate report and recommendation.

Indeed in Thomas vs. Ann this Court did not decide whether the act mandates a waiver of appellate review absent objection to the US Magistrate and recommendation and therefore review by the District Court, or appeal to the Circuit Court was not waived. See Thomas at 149.

The Federal Magistrate Act gave authority to US Magistrate to decide dispositive motions 28 USC 636 (c) provides the following:

> **(C)** the magistrate judge shall file his proposed findings and recommendation under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days being served a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with

instructions.

Rule 72 (b) of the Federal Rules of Civil procedure has a similar language. In fact in both of them the clear and unambiguous language mandates that the District Court retains the power to accept, reject or modify the magistrate report and recommendation. See Thomas at 156 (Brennan dissenting opinion).

The U.S. District Court in its Order dated November 27, 2002, stated that petitioner failed to satisfy the Court's requirement and have simply restated all the arguments addressed in his motion in opposition to Motion to Dismiss and Motion in opposition to United States renewed Motion to Dismiss and submitting amended complaint.

A close look to the objection to Magistrate Report and Recommendation reveals that Petitioner objected specifically portions of the US Magistrate Report and Recommendation. **See Exhibit VIII Pages 84-119.**

The averments contained in the opposition to Magistrate Report and Recommendation are more than sufficient to establish a cause of action against defendants as we previously discussed and the Circuit Court has accepted.

We must mention that the standard to evaluate a Motion to Dismiss under Rule 12 is different from the standard to rule upon a Motion for Summary Judgment under Rule 56 of the Civil Procedure. Under the first rule mentioned there is no need to provide documentary evidence as proof of the complaint, particularly when at this stage discovery proceedings were not initiated.

As Petitioner expressed in the Opposition to Magistrate Report and Recommendation: "What more do defendants want?

That in its complaint plaintiff not only set forth their cause of action but that in addition it supply all the evidence in support thereof? **See Exhibit VIII, 84-119.**

We insist that Petitioner has comply with the requirements of Rule 12 and 28 USC 636 by asserting specific objections to Magistrate Report and Recommendation, therefore appellate review was not precluded.

IV. CONCLUSION

WHEREFORE, and since the first issue presented for review is a novel question which has not been but should be solved by this Supreme Court, this Court must ascertain jurisdiction in this case and grant the petition for Certiorari also this Court should grant this petition for certiorari because the Circuit Court of Appeal erred as a matter of law in deciding the issues presented for review in regard to the dismissal of the Bivens Claims and the ruling upon the Magistrate Report and Recommendation.

RESPECTFULLY SUBMITTED.

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December 24th, 2003

APPENDIX LIST

I.	U.S Court of Appeals for the First Circuit Judgment; Civil No. 03-1113; entered Sept. 26, 2003	**1-8**
II.	U.S. District Court Order, dated November 27, 2002, civil no. 00-1778(DRD), **entered Nov. 27, 2002**	**9-15**
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VIII	Objection to Magistrate Report and Recommendation or Response to Order	**84-119**
IX	Amended Complaint, 00-1778	**120-136**
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United States Court of Appeals
For the First Circuit

No. 03-1113

NICOLAS NOGUERAS-CARTAGENA, ETC., ET AL.,
Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ETAL,
Defendants, Appellees.

JUDGMENT

Entered: September 26, 2003

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court :

"stamp signed"
Mark R. Syska, Chief Deputy Clerk

[cc: Mr. Harding, Mr. Zabel, Mr. De Monaco and Mr. Feldman.]

United States Court of Appeals

For the First Circuit

No. 03-1113

NICOLAS NOGUERAS-CARTAGENA, ETC., ET AL.,

Plaintiffs, Appellants,

v.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Daniel R. Domínguez, U.S. District Judge]

Before

Selya, Circuit Judge,

Coffin, Senior Circuit Judge,

and Howard, Circuit Judge.

Armando Porrata-Doria Harding, with whom Nicoláás Nogueras, Jr. was on brief, for appellants.

Matthew L. Zabel, with whom Peter D. Keisler, Acting Assistant Attorney General, and Phyllis J. Pyles, Assistant Director, Torts Branch, Civil Division, were on brief, for the United States.

Charles A. De Monaco, with whom Kimberly L. Haddox and Dickie, McCamey & Chilcote, P.C. were on brief for appellees Gil-Bonar and Vega-Pacheco.

Cary M. Feldman, with whom Armelle N. VanDorp and Feldesman Tucker Leifer Fidell were on brief, for appellee Johnson.

September 26, 2003

Per Curiam. The case underlying this appeal arose in the wake of the failed prosecution of Nicolás Nogueras-Cartagena (Nogueras), a prominent politician who had been indicted on charges relating to tax fraud and violations of the Ethics in Government Act. Following the dismissal of the criminal case, Nogueras sought to recover money damages against the federal government, the prosecutors, and the two federal agents who had spearheaded the investigation. On January 4,

2000, Nogueras filed an administrative claim with the Internal Revenue Service (IRS). On June 21, 2000, he moved forward on that claim, suing the United States and alleging, inter alia, false arrest and malicious prosecution under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§§§ 1346(b), 2671-2680. In the same action, he also sued four individual federal officers (two prosecutors, an FBI agent, and an IRS agent),[1] alleging constitutional violations under the doctrine of Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

The United States moved for dismissal of all claims against it. See Fed. R. Civ. P. 12(b)(1), 12(b)(6). A magistrate judge recommended the dismissal of most of the claims, Nogueras v. United States, Civ. No. 00-1778 (D.P.R. Sept. 10, 2001), and the district court adopted that recommendation, Nogueras v. United States, 172 F. Supp. 2d 296 (D.P.R. 2001). Nogueras then submitted a further amended complaint. In due course, a second magistrate judge, responding to a new round of motions, recommended dismissal both of the remaining claims against the government and of the claims asserted against the individual defendants. Nogueras v. United States, Civ. No. 00-1778 (D.P.R. Sept. 18, 2002). The district court adopted the magistrate judge's report and recommendation and dismissed the action. Nogueras v. United States, Civ. No. 00-1778 (D.P.R. Nov. 27, 2002). This appeal ensued.

We need not tarry. We have carefully perused the record and find no reason to disturb the district court's rulings. And

because this is a situation in which three judicial officers (two magistrate judges and a district judge) have analyzed Nogueras's arguments and written comprehensive, well-reasoned decisions, we are hesitant to wax longiloquent simply to hear our own words resonate. See In re San Juan Dupont Plaza Hotel Fire Litig., 989 F.2d 36, 38 (1st Cir. 1993) (taking a similar view). Consequently, we affirm substantially on the basis of the lower courts' rescripts, adding only a few brief comments.

First: The FTCA claims are completely barred because Nogueras failed to comply with the statutory requirements for administrative exhaustion. An action brought under the FTCA must be presented to the appropriate federal agency (here, the IRS) in the first instance. See 28 U.S.C. §§ 2675(a). The claimant then must await a final disposition from that agency (or, in lieu thereof, the passage of six months without final agency action). Id. Only then may the claimant sue in federal court. Id.

Nogueras did not abide by this timetable, but, rather, sued in the absence of final agency action and in less than six months after he had filed his administrative claim with the IRS. That failure creates an incurable jurisdictional defect. See McNeil v. United States, 508 U.S. 106, 113 (1993); Gonzalez v. United States, 284 F.3d 281, 288 (1st Cir. 2002); Attallah v. United States, 955 F.2d 776, 779 (1st Cir. 1991).

Second: The Bivens claims against the individual defendants are forfeit because, despite clear and repeated direction from

the district court, Nogueras failed to make focused, targeted objections to the second magistrate judge's report and recommendation. Failure to identify the particular portions of the report and recommendation to which objection is being made and to specify the basis for each such objection precludes appellate review. See Thomas v. Arn, 474 U.S. 140, 155 (1985); Henley Drilling Co. v. McGee, 36 F.3d 143, 150 (1st Cir. 1994); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); see also Fed. R. Civ. P. 72(b); 28 U.S.C. §§ 636(b)(1)(C).

Third: Even had the claims against the individual defendants not been forfeited, we would uphold the district court's dismissal of those claims on the merits. As to the prosecutors, the record reflects that the actions of which Nogueras complains were, without exception, done in the officials' capacity as prosecutors. Consequently, those actions are shielded by the absolute immunity that attaches to exercises of prosecutorial discretion. Imbler v. Pachtman, 424 U.S. 409, 430 (1976); Reid v. State of N.H., 56 F.3d 332, 337 (1st Cir. 1995). The subjective intent of the prosecutors is irrelevant, especially in view of the fact that, here, the indictment provides irrefutable evidence of the existence of probable cause. See Forrester v. White, 484 U.S. 219, 224 (1988).

As to the FBI agent (Johnson), the district court dismissed the Bivens claims based on a finding of qualified immunity. With one possible exception, that decision appears to be unimpugnable. See Saucier v. Katz, 533 U.S. 194, 202

(2001); Malley v. Briggs, 475 U.S. 335, 341 (1986). The one exception relates to malicious prosecution. We must accept as true Nogueras's allegations and draw all reasonable inferences in his favor. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (setting forth applicable standard on motions to dismiss). Nogueras's allegations are pointed and, following the standard praxis, dismissing the claim of malicious prosecution under the doctrine of qualified immunity might be problematic. See generally Rivera Marcano v. Normeat Royal Dane Quality A/S, 998 F.2d 34, 37 (1st Cir. 1993) (describing the elements of such a claim under Puerto Rico law).

We need not probe this point too deeply, however, as we are free to uphold the ruling below on any independent ground made manifest by the record. See Gannett v. Carp (In re Carp), 340 F.3d 15, 22 (1st Cir. 2003); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999). We affirm here because, insofar as the malicious prosecution claim is concerned, Johnson's actions were shielded by absolute prosecutorial immunity.

The existence of absolute prosecutorial immunity is a matter of function; it depends not on the title or position of the official involved, but, rather, on the specific conduct in question. See Briscoe v. LaHue, 460 U.S. 325, 342 (1983). In this instance, the challenged conduct, as described in Nogueras's pleadings, was intimately associated with the judicial phase of the criminal process. It was, therefore,

essentially prosecutorial in nature. See id. at 336. Hence, immunity attaches.

We need go no further. Concluding, as we do, that the district court correctly dismissed each and all of Nogueras's claims, we summarily reject his appeal.

Affirmed.

1. The prosecutors (Guillermo Gil-Bonar and Jorge E. Vega-Pacheco) and the FBI agent (John D. Johnson) are parties to this appeal. Nogueras has, however, abandoned his claims against the IRS agent (José E. González).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NICOLAS NOGUERAS CARTAGENA, et al,
Plaintiffs,

CIVIL NO. 00-1778 (DRD)

v.

UNITED STATES OF AMERICA, et al,
Defendant,

[STAMP:RECEIVED & FILED 11/27/02, OFFICE CLERK US DIST. CT, SAN JUAN, PR]

ORDER

On September 26, 2002, this Court issued an order (Docket No. 127) adopting Magistrate Judge Justo Arena's Report and Recommendation of September 18, 2002 (Docket No. 126). The Court specifically stayed the issuance of a judgment dismissing this case in its entirety to allow for properly pled objections to the Magistrate'3 Report and Recommendation. On September 27. 2002, Defendant John Johnson filed a Motion for Modification of the Magistrate Judge's Report and Recommendation. Docket No. 129. After granting two extensions, the Court patiently awaited objections to be filed by the Plaintiffs. On October 21, 2002 the Plaintiffs filed an Objection to Magistrate's

Report and Recommendation or Response to Order. Docket No. 1.32. Then on November 7, 2002, Defendants United States and John Johnson filed Responses to Plaintiffs' Objection to the Magistrate's Report and Recommendation/Morion for Reconsideration (Docket No. 133 and 134 respectively).

The two basic underlying causes of action stem from a 1996 indictment filed by then Acting U.S. Attorney for the District of Puerto Rico against the Plaintiffs. These two causes of action include a *Bivens* claim for violation of the Plaintiffs' federal constitutional rights *(see: Bivens v. Six Unhwvn Fed. Narcotics Agents,* 403 U.S. 383, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)), and a Federal Tort Claims Act for false arrest and malicious prosecution *(see:* 28 U.S.C. § 1346).The ultimate recommendation of Magistrate Arenas was that Defendants' Motions to Dismiss be granted, and this case dismissed. After careful consideration of the Magistrate's Report and Recommendation, both the opposition and modification, the defendants' responses, and the previous pleadings regarding the dismissal of this action, the **Court hereby ADOPTS THE MAGISTRATE'S REPORT AND RECOMMENDATION and GRANTS the dismissal of this case.** In the September *26,* 2002 Order, the Court clearly mandated that the parties' objections to the Magistrate's Report and Recommendation v/ere to be limited to the specific findings of Magistrate Arenas and that the Court would only review the items in which the parties specifically objected to. This important mandate was included in the original Report and Recommendation as Magistrate Judge Arenas noted, "the written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further

appellate review." Docket No. 126. *See Thomas v. Am,* 474 U.S. 140, 155 (1985), *reh 'g denied,* 474 U.S. 1111 (1986); *Dover v. Maccorone,* 973 F.2d 22, 30-31 (1st Cir. 1992); *Paters on-Lsitch Co. v. Massachusetts Mun. Wholesale Elec. Co.,* S40 F.2d 985 (I[11] Cir. 1988); *Bore/en* v. *Secretary of Health and Human Servs.,* 836 F.2d 4, 6 (1* Cir. 1987); *Scott* v. *Schweiker,* 702 F.2d 13, 14 (1" Cir. 1983); *United States* v. *Vega,* 678 F.2d 376, 378-?9 (I[s] Cir. 1982); *Park Motor Mart. Inc.* v. *Ford Motor Co.,* 616 F.2d 603 (1" Cir. 19SO). The Court's mandate was overwhelming clear.

Plaintiffs have failed to satisfy the Court's requirement and have simply restated the basis for opposition to the defendant's motion for dismissal. Rather than addressing the particular Report and Recommendation, citing specific portions, and stating a basis for objection, Plaintiffs have attempted to reiterate every argument enumerated in Plaintiffs Opposition to Motion to Dismiss by Co-Defendant (Docket No. 118) as well as in Plaintiffs Motion in Opposition to United States Renewed Motion to Dismiss and Submitting Amended Complaint (Docket No. 98), both or which were examined and analyzed by Magistrate Judge .Arenas in preparation of the Report and Recommendation in question.

The Court was able to discern that twenty six pages of the thirty plus page Objection to the Magistrate's Report and Recommendation or Response to Order (Docket No. 132) contained the identical arguments, citations, and references as those included in Plaintiffs two oppositions to the motion to dismiss. They had not been altered in any way to reflect the Plaintiffs'

specific objections to the Report and Recommendation. The five remaining pages merely recite the procedural posture of this case and reference the Report and Recommendation on one occasion. This one reference is buried on page 17 between the previous pleadings already before the Court.

In this one reference to the Report and Recommendation, Plaintiffs note the defendants' arguments and contentions. Plaintiffs then fail to articulate or point to any particular portion of the second amended complaint as evidence that this case should survive Defendants' Motion to Dismiss. Furthermore, Plaintiffs fail to attempt to establish that the second amended complaint contains sufficient allegations to state a claim for which relief is available. This failure on the part of the Plaintiffs to specifically object to the Report and Recommendation's finding, to contest the facts upon which the indictment was issued, and to dispute the finding of probable cause for Plaintiffs arrest and indictment has provided the Court with no specific grounds to reconsider or reverse the findings of the Magistrate's Report and Recommendation. Furthermore, the Court is in agreement with Magistrate Arenas that Plaintiffs' belief that misconduct took place is sufficient to state a claim in this matter as Plaintiffs have not overcome the probable cause determination made by the grand jury by contesting the facts upon which the indictment was issued.

The Court has already addressed the Federal Tort Claims Act, stating that the Act itself holds that state law of the state where the alleged damages took place controls, and identifying the key issue in Puerto Rico as whether an arresting officer lacked reasonable

cause for believing suspect had committed a felony. *See: Rodriguez v. United States,* 54 F.3d 41, 44 (1 * Cir. 1995); *Abreu Guzman v. Ford, 241 F.3d 69,* 75 (1st Cir. 2001). With a Grand Jury indictment, sufficient probable cause existed to make the arrest. With probable cause, under Puerto Rico law the arresting officers are shielded from causes of action as to false arrest, false imprisonment, and / or malicious prosecution, and thus Magistrate Arenas recommended the Federal Tort Claims Act cause of action be dismissed as well. *See: Harrington v. United States,* 748 F. Supp, 919. 933 (D.P.R, 1990) (citing line of Puerto Rico - caselaw on point). Without contesting the facts upon which the indictment was issued, Plaintiffs have failed to state a claim for which relief may be granted. Without opposing the Magistrate's Report and Recommendation by specifically pointing to those facts which contest the facts upon which the indictment was issued, the Plaintiffs have failed to provide the Court any basis not to the adopt the Magistrate's Report and Recommendation. Plaintiffs were forewarned that all written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections and that failure to comply with this rule precludes further appellate review. Plaintiffs failed to heed the Honorable Magistrate's clear warning based upon the mandate of the law.

With respect to Defendant John Johnson's Motion for Modification of Magistrate Judge's Report and Recommendation (Docket No. 129), the Court refuses the Defendant's invitation to modify the Magistrate's Report and Recommendation and include

absolute immunity as a further ground for the dismissal of Plaintiffs *Bivens* claim. The Court is hesitant to rule that Defendant's actions were entirely based upon governmental functions attributable to the prosecution of the criminal case against Plaintiff, especially at such an early stage since such a finding must be made as a matter of law. Without ruling on the matter of absolute immunity, the Court is satisfied with the findings of Magistrate Judge Arenas regarding the Defendant's qualified immunity, especially as sufficient grounds for dismissal of this case due to the probable cause finding of the grand jury. The Court need not and will not accept Defendant's modification in light of the final result reached herein, a dismissal of all claims against Defendant.

As this Court has noted previously, the ultimate question in a *Bivens* claim is whether an objectively reasonable officer would have understood that his or her conduct violated a clearly established constitutional right. *See: Abreu Guzman,* 241 F.3d at 73. The Fourth Amendment requires arrests be made based on probable cause, and when an arrest is made subject to a warrant, even if probable cause may be lacking, an arresting officer is entitled to qualified immunity. This is true unless the warrant is so lacking in probable cause that official belief in its existence would be unreasonable. *See: Id.* A Grand Jury returned an indictment in this case, establishing probable cause against Co-Plaintiff Nogueras. As such, a reasonable officer could thus

believe probable cause existed for the arrest, thereby substantiating the qualified immunity shield the Defendants have attempted to utilize in defending the *Bivens* claim..

Magistrate .Arenas reported Plaintiffs have not contested the facts upon which the indictment was issued, and the Court is in agreement. This is the crux of Plaintiff s case on both the *Sevens* claim and the Federal Tort Claims Act claim. This Court has previously adopted the report and finds no proper objections to the Magistrate's Report and Recommendation warranting vacation of the Court's order. The Court hereby **CONFIRMS ADOPTION OF THE MAGISTRATE'S REPORT AND RECOMMENDATION IN ITS ENTIRETY and DISMISSES ALL CLAIMS AGAINST** DEFENDANTS.

DATE: November 27, 2002.

[signed DANIEL R. DOMINGUEZ]
DANIEL R. DOMINGUEZ
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NICOLAS NOGUERAS CARTAGENA, *et* aL,
Plaintiffs,

CIVIL NO. 00-1778(DRD)

UNITED STATES OF AMERICA, et al.,
Defendants.

JUDGMENT

The Court having this same day adopted the Magistrate's Report and Recommendation (Docket No. 125) to grant the Defendants' Motion to Dismiss the second amended complaint, hereby enters judgment dismissing this action against all defendants without imposition of costs, expenses or attorneys' fees

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Date: November 27, 2002

DANIEL R. DOMINGUEZ
U.S. District Judge

UNITED STATES DISTRICT COURT
OR THE DISTRICT OF PUERTO RICO

NICOLAS NOGUERAS CARTAGENA, et als.,
Plaintiffs
v. **Case Number: 00-1778 (DRD)**

UNITED STATES OF AMERICA, et al
Defendants

OPINION AND ORDER

Plaintiffs filed their complaint on June 21, 2000 (Docket # 1). An amended complaint was filed on October 18, 2000, raising tort claims pursuant to the Federal Tort Claims Act (FTCA), 78U..S.C. §§ 1346(b), 2671 -2680, and a *Bivens* claim alleging that the individually named defendants violated the constitutional rights of the Plaintiffs (Docket # 4). Co-Defendant United States of America (hereafter "Defendant") moved to dismiss claims raised pursuant to the FTCA on the following bases'- 1) those claims based upon the prosecutors' conduct are barred because they fall outside the United States' limited waiver of sovereign immunity under the FTCA; 2) the negligent investigation claims are jurisdictionally barred by the discretionary function exception to the FTCA; and, 3) and the false arrest, malicious prosecution claim and abuse of process claims fail to slate a claim under Puerto Rico law (Docket #14).

Plaintiffs contended dismissal was not proper as

defendants are collaterally estopped from contesting the allegations contained in the complaint due to orders entered by the Court in the underlying criminal case. Further, Plaintiffs claimed that the Court is not required to dismiss claims alleging conduct which might fall within the intentional torts exception to FTCA claims. Finally, as to the claims of negligent investigation. Plaintiffs asserted Co-Defendants U.S. Attorney Guillermo Gil and Assistant U.S. Attorney Jorge Vega were not shielded by limited waiver of sovereign immunity under the FTCA (28 U.S.C. § 2680(h)).

Subsequently, Plaintiffs moved for partial summary judgment against the United States based upon the actions of U.S. Attorney Gil (Docket # 29). Plaintiffs asserted that the United States is barred by collateral estoppel from contesting liability based upon orders entered by the pressing and trial judge in the underlying criminal matter (Criminal No. 96-104(CCC)). Defendant responded that Plaintiffs have failed to set forth material undisputed facts establishing the specific elements of their tort claims which are grounded on false arrest and malicious prosecution. Additionally, the Defendant asserted that Plaintiffs have not shown they are entitled to judgment as a matter of law as jurisdictional issues under the FTCA as well as legal issues under Puerto Rico law bar the issuance of the remedy (Docket #30).

Defendant then moved for an Order substituting the United States as defendant for the other individually named co-defendants for the claims in this action brought pursuant to the Federal Tort Claims Act (FTCA) (Docket #36). The Plaintiffs objected to the substitution (Docket #57).

The motions were referred to the Honorable Magistrate Judge Aida M. Delgado-Colon fora Report and Recommendation (Docket # 45; hereafter "R&R"), pursuant to 28 U.S.C. §636(b)(l)(B) (1993); Fed. R. Civ. P. 72(b); and Rule 503, Local Rules, District of Puerto Rico. *See* Mathews v.Weber. 423 U.S. 261 (1976). On September 10,2001, Magistrate Judge Delgado issued her R&R in the above referenced case Docket #83). Magistrate Judge Delgado made the following recommendations to the Court:

1. That the United States Motion to Dismiss be GRANTED in part and DENIED in part Docket # 14) as follows:

A. That the Motion to Dismiss be GRANTED for lack of subject matter jurisdiction as to allegations raised against Gil and Vega for fake arrest, malicious prosecution and abuse of process (R&R: Section 1II.B.2.).

B. That the Motion to Dismiss be DENIED as to the allegations of the actions of the investigative and law enforcement officers for false arrest and malicious prosecution (R&R: Section III.B.2).

C. That the Motion to Dismiss be GRANTED as to the abuse of process claims as
alleged against investigative or law enforcement officials BUT that said claims be dismissed without prejudice, with leave to amend if Plaintiffs so desire (R&R:
Section III.B.2.b).

D. That the Motion to Dismiss be GRANTED (as to prosecutors and law enforcement
agents) as to the negligent investigation claims (R&R: Section

11I.B.3).

2. That Plaintiffs' Motion for Partial Summary Judgment be **DENIED** (Docket # 29) (R&R: Section IV).

3. That Defendants' Motion for Substitution (Docket *n* 36) be GRANTED and that all Puerto Rico common law claims be dismissed with prejudice against the individually named defendants (R&R: Section II).

The R&R further indicated that Objections thereto were due within ten (10) days of the parties' receipt thereof. On September 17. 2001. Plaintiffs filed a Motion Requesting Review of Sworn Statement for Reconsideration of Report & Recommendation (Docket #86). Plaintiffs' Motion referred to a non-existing sworn statement. On September 28, 2001, Plaintiffs filed the missing "Sworn Statement", which in effect was a summary of their Amended Complaint (Docket #94). On September 19, 2001, Defendant moved for an extension of time (Docket #89) to file possible objections to the R&R. or in the alternative, to have the Court consider their Motion for 12 Reconsideration (Docket #87) as their Objections to the R&R. On September 26, 2001 the Court denied the time extension as requested, instead granting all parties until 5:00 PM on September 28, 14, 2001. to file any possible R&R objections (Docket #93). In the event Defendant did not make a subsequent filing, the Court noted Defendant's Motion for Reconsideration would be considered

as R&R objections timely filed. Finally, our Order stated "NO FURTHER EXTENSIONS SHALL BE GRANTED." (Emphasis in the original.)

The District Court may refer dispositive motions to a United States Magistrate Judge for a Report and Recommendation. 28 U.S.C. § 636(b)(l)(B) (1993); Fed. R. Civ. P. 72(b); Rule 503, Local Rules, District of Puerto Rico. *See* Mathews v. Weber. 423 U.S. 261 (1976). Of course, an 2;adversely affected party may contest the Magistrate's report and recommendation; 28 U.S.C. § 22 636(b)(]) (1993), in pertinent part, provides that:

> Within ten days of being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de no\o* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

This statutory provision is echoed by Fed. R. Civ. P. 72(b) and Local Rule 510.2. In addition, Local Rule 510.2(A) states that "[a]ny objections to the Magistrate Judge's proposed findings, recommendation, or report must be filed

with the Clerk of the Court within ten (10) days after being served with [a] copy thereof. *Failure to file objections within the specified time waives the right to* appeal the District Court's order" (emphasis added). Rules such as this one have been approved by the U.S. Supreme Court. Thomas v. Arn. 474 U.S. 140,155 (1980) ("[w]e hold that a court of appeals may adopt a rule conditioning appeal, when taken from a District Court judgment that adopts a magistrate's report and recommendation, upon the filing of objections with the District Court identifying those issues on which further review is desired.").

Plaintiffs' Motion Requesting Review of Sworn Statement for Reconsideration of Report & Recommendation

Plaintiffs' Motion Requesting Review of Sworn Statement for Reconsideration of Report & Recommendation (Docket #86) is extremely unclear, at best. The only item that is clear is Plaintiffs are not satisfied with the Magistrate's recommendation that :he United States be substituted for the individually named defendants (and the Court assumes hence, that all state claims be dismissed as against the individually named defendants). Their three-paragraph, single-page motion contains no specific abjections to the R&R whatsoever. In fact, their only reference to the R&R is their first paragraph, which states in its entirety: "That on September 13th, 2001, the

Honorable Magistrate Judge entered the Report and Recommendation concerning various matters on the docket."

Plaintiffs through Paragraph 2 then adopt their entire Memorandum of Law in support of their Opposition to Motion to Dismiss, *by reference*. Paragraph 3 then simply requests that the Court consider a statement of uncontested facts contained in an attached sworn statement "be considered long with [their] opposition to substitution. As noted earlier, the "Sworn Statement" was in essence a restatement of their Amended Complaint, and there was no reference to the R&R within whatsoever.

Our Local Rules are very clear and specific as to procedures to follow in properly objecting to a Magistrate's recommendations. Local Rule 510.2 particularly states an objecting party shall file "written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the legal basis for such objections." Id. Plaintiffs' Motion Requesting Review of Sworn Statement for Reconsideration of Report & Recommendation is completely insufficient to serve as an objection to the Magistrate's R&R.

Defendant's Motion for Reconsideration.

As noted above, in our Order of September 26, 2001, the Court noted Defendant's Motion for Reconsideration (Docket #87) would be considered as R&R objections timely filed (Docket #93). Defendant makes one objection to the R&R concerning the Magistrate's

recommendation that the Defendant's Motion to Dismiss (Docket #14) be denied as to the allegations of the actions of the investigative and law enforcement officer (Co-Defendant Johnson) for false arrest and malicious prosecution. The Magistrate reasoned that the Plaintiffs' alleged facts in the Amended Complaint of agents knowingly providing false information, and a tainted grand juror (Co-Defendant Agent Johnson's wife served as a grand juror), were sufficient to rebut the claim of probable cause by the grand jury and that the indictment was fair upon its face. Defendant's Motion for Reconsideration includes two new pieces of evidence not previously available for review by the Magistrate, which Defendants allege specifically counter the Magistrate's recommendation.

The Court notes this is the first time this evidence has been presented. Defendant correctly recognizes possible problems with using these documents now to presently rebut the recommendation of the Magistrate after her detailed analysis of the case (with all documents properly before her). Defendant refers to Magistrate Judge Delgado's notice that "review of a... [R&R]... by a District Judge... does not permit considerations of issues not raised before the Magistrate Judge." R&R p. 28. The Defendant thus requests in the alternative that their Motion be considered a renewed Motion for Dismissal on the specific point given the new found evidence.

It is true that "Systemic efficiencies would be frustrated and the magistrate's role reduced to that of a mere dress rehearser if a parry were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round." Patterson-Leitch Co.. Inc. v. Massachusetts Municipal Wholesale Electrical Co.. 840 F.2d 985,991 (1st Cir. 1988). The District Court, however, is allowed to consider new evidence when conducting a proper *de novo* review of a timely specific objection, Fed.R.Civ.P. 72(b); Patterson-Leitch. *supra* at 990. At bar the Court is not convinced the new evidence does not constitute a new issue. Additionally, it would be patently unfair to now rule on the "new evidence", if in fact it was just that (and not a new issue being raised), without providing Plaintiffs opportunity to be heard. There is nothing which would preclude Defendant from filing a renewed Motion to Dismiss, as they have done, and the Court believes this to be the fairer route to follow. Defendant's Motion for Reconsideration (Docket £37) is to be considered, as requested by the Defendant, as a **renewed Motion to Dismiss.** Plaintiffs now have the full force of the Rules of Civil Procedure to appropriately respond should they so desire.[1]

In view of the above....

What we really have left is an unobjected-to R&R. "Absent objection by the [parties], the District Court had a right to assume that [the parties] agreed to the magistrate's recommendation." Templeman v. Chris Craft Corp.. 770 F.2d 245, 24? (1st Cir.), *cert, denied,* 474

U.S. 1021 (1985). Moreover, "failure to raise objections to the Report and Recommendation waives that party's right to review in the District Court and those claims not preserved by such objection are precluded on appeal."Davetv-Maccarone. 973 F.2d22.30-31(181 Cir. 1992). See Keating vs. Secretary of H.H.S.., 848 F.2d 27!, 275 (1st Cir. 1988); Borden v. Secretary of H.H.S.. 836 F.2d 4,6 (1987) ("[appellant was entitled to a *de novo* review by the District Court of the recommendations to which he objected, ..., however he was not entitled to a *de novo* review of an argument never raised"); United States v. Valencia. 792 F.2d 4. 6 (1st Cir. 1986): Park Motor Mart. Inc. v. Ford Motor Co.. 616 F.2d 603.605 {1st Cir. 1980).

Nevertheless, District Courts axe not barred from reviewing unopposed Reports and Recommendations. Section 636(b)(1), Rule 72(b), and Local Rule *5* \ 0.2 al 1 state that a District Court will review *de novo* any portion of the Report and Recommendation specifically objected to, but none specifies what standard of review will be applicable if no objection is filed. Local Rule 510.2(A) merely provides that a failure to object will waive the plaintiff s right to appeal from the District Court's decision. As the Supreme Court stated, "while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard." Thomas v. Arn:. 474 U.S. 140,154 (1985). Rule 72(b) and Local Rule 510.2(A) would not do .so, either. To the contrary, it appears to be completely at the discretion of the District Court whether or not to

review an unopposed Report and Recommendation.

This Court prefers to err on the side of caution and adopt the Advisory Committee view that "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b) advisory committee's note (1983) (emphasis added). Therefore, this Court reviews the Magistrate's Report and Recommendation to ascertain whether or not the Magistrate's recommendation was clearly erroneous.

The Court takes special notice here of the expertly reasoned and superbly written R&R produced by Magistrate Judge Delgado. Indeed of the myriad of issues at bar addressed by Magistrate Delgado, her R&R could be considered the Hornbook on the matter. "There is little point in attempting to reinvent a well-fashioned wheel. Where, as here, a [magistrate] judge astutely takes the measure of a case and hands down a convincing, well-reasoned decision, [the Court] should refrain from writing at length to no other enc than to hear its own words resonate." Corrada Betances v. Sea Land Services. Inc.. 284 F.3d 40, 42 (1st Cir. 2001); Lawton v. State Mut. Life Assur.C P.. 101 F.3d 218,220 (1st Cir.1996); accord Cruz-Ramos v. .P.R.Sun Oil Co. 202 F.3d 381,383 (1st Cir.2000); Avala v. Union de Tronquistas de P.R.. Local 901. 74 F.3d 344, 345 (1st Cir. 1996); Holders Capital Corp. v. Cal. Union Ins Co. (In re San Juan Dupont Plaza Hotel Fire LitigJ, 989F.2d36, 38 (1st Cir.1993).

WHEREFORE, the Court **APPROVES** and ADOPTS the Honorable Magistrate Judge's Report and Recommendation **in its**

totality To recap:

1. United States Motion to Dismiss is **GRANTED in part and DENIED in part** (Docket# 14} as follows:

A. The Motion to Dismiss is GRANTED with prejudice for lack of subject matter jurisdiction as to allegations raised against Gil and Vega for false arrest, malicious prosecution and abuse of process.

B. The Motion to Dismiss Is DENIED as to the allegations of the actions of the investigative and law enforcement officers for false arrest and malicious prosecution. (The Court notes a renewed Motion to Dismiss (Docket #87) on this point has been filed and awaits Plaintiffs' response, if any.)

C. The Motion to Dismiss is GRANTED without prejudice as to the abuse of process claims as alleged against investigative or law enforcement officials. (The Court Grants Plaintiffs leave to amend as suggested by the Magistrate if Plaintiffs o desire.)

D. The Motion to Dismiss is GRANTED with prejudice (as to prosecutors and law enforcement agents) as to the negligent investigation claims.

2. Plaintiffs' Motion for Partial Summary Judgment is DENIED (Docket # 29).

3. Defendants' Motion for Substitution (Docket # 36) is **GRANTED.** All Puerto Rico common law claims are dismissed with prejudice against the individually named defendants..
IT IS SO ORDERED.

[signed DANIEL R. DOMINGUEZ]
Date: September 28, 2001 **DANIEL R DOMINGUEZ**
U.S. District Judge

1. Without drawing any conclusions upon the merits of argument raised within the Renewed Motion to Dismiss, the Court does remind the parties of well-settled case law noting :u considering a Rule 12(b)(6) motion only well-pleaded facts are taken true as opposed to "unsupported conclusions or interpretation of the law". Washington Legal Foundation v. Massachusetts Bar Foundation. 993 F.2d962. 971 (PCir. 1993): *see generally* Ocean Logistics Mart. Inc. v. N'PR Inc.. 38 F.Supp 2d 77, SO (D.P.R. 1999). Furthermore. The District Court of Puerto Rico has specifically addressed the requirement of adequate specificity in relation 10 allegations against FBI and IRS agents acting with malice before .1 Grand Jury in Torrcs-D.ueño v. United States. D.P.R. Civ. # 00-1894 (HL).

2. The following matters thus remain as viable claims: 1} the false arrest and malicious prosecution allegations brought pursuant to the Federal Ton Claims Act against the United States, for the actions of FBI and IRS agents (though, again. the Defendant has already submitted a Renewed Motion to Dismiss on this matter (lack of factual specificity in the Amended Complaint is claimed as grounds fur dismissal), and the. Court await-; Plaintiffs' response, if any 1, and 2) the *Bivens* for violations of plaintiffs' federal constitutional rights against: U.S. Attorney Gil. Assistant U.S. Attorney Vega and FBI Agent Johnson.'

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[US DISTRICT COURT, SAN JUAN PR.
RECEIVED AND FILED 2002 Sept.
18pm 4:52]

NICOLAS NOGUERAS -CARTAGENA, et al.,
Plaintiffs

v.

UNITED STATES OF AMERICA, Et al.,
Defendants

CIVIL 00-1 778 (DRD)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

On September 19, 2001, the defendant United States filed a motion for reconsideration of magistrate judge's report and recommendation and/or renewed motion to dismiss claiming that plaintiffs' general, conclusory allegations are insufficient to avoid dismissal. (Docket No. 87.) In an opinion and order filed on September 28, 2001, the court construed the motion as a renewed motion to dismiss. (Docket No. 96, at 6, 8.) This matter is before this court on defendant United States' motion requesting the

granting of their renewed motion to dismiss filed on November 20, 2001. (Docket No. 97.) Subsequently, on November 30, 2001, plaintiffs filed a motion in opposition to defendant United States' renewed motion to dismiss, submitting a second amended complaint alleging malicious prosecution, false arrest and false imprisonment as well as negligent and/or intentional abuse of process against the defendants. (Docket No. 98.) On January 10, 02, defendant United States filed a motion with memorandum in support of its motion to dismiss plaintiffs' second amended complaint. (Docket No. 99.) Co-defendants United States Attorney Guillermo Gil-Bonar and Assistant United States Attorney Jorge E. Vega-Pacheco filed a motion in response to plaintiffs' opposition to defendant United States renewed motion to dismiss on February 7,2002. (Docket No. 100.) On January 15,2002, plaintiffs filed a response in opposition to defendant United States' motion to dismissplaintiffs' second amended complaint. (Docket No. 102.) Defendant United States then filed a supplement to their motion to dismiss. (Docket No. 111.) Accordingly, plaintiffs Filed a response in opposition to defendant's supplement to its motion to dismiss. (Docket .No.119.) Lastly, defendant United States replied to plaintiffs' opposition to defendant's motion to dismiss. (Docket No. 120.) Co-defendant John Johnson also filed a motion to

dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) claiming that plaintiffs' complaint lacks sufficient facts to give rise to an inference that there was a "meeting of the minds" among the co-defendants to conspire against the

plaintiffs, and that he as an FBI agent and while acting as investigator for the United States Attorneys Office is immune from any damages arising out of his grand jury testimony as well as from any liability for damages in relation to the allegedly negligent investigation into plaintiffs' case. (Docket No. 110.) Plaintiffs filed on July 12, 2002, an opposition to co-defendant Johnson's motion to dismiss arguing that there are mo grounds for immunity in face of the constitutional violations against the plaintiffs and because the issues raised have already been resolved by Magistrate Judge Aida Delgado in her report and recommendation.(Docket No. .118.) Due to the similarities between all the motions before this court, I will address all of them at this time.

I. FACTUAL BACKGROUND

On April 24, 1996, an indictment was filed by the United States Attorney for the District of Puerto Rico, charging plaintiff Nicolas Nogueras Cartagena and his wife Abigail Mojica Escobar with the following offenses: conspiracy to defraud the United States by impeding and defeating the IRS's evaluation and collections of taxes, interest, and penalties under L8 U.S.C. § 371; with aiding and abetting a violation of the Ethics in Government Act relating to Mr. Jose" Torres-Dueño's representation of the plaintiffs before the IRS on a matter in which Torres had previously participated as an IRS official, 18 U.S.C. § 207(a); structuring financial transactions to avoid reporting requirements, 31 U.S.C. § 5324(a)(3); and making false statements, 18 U.S.C.

§ 1001. (Docket No. 1, at 4, ¶ 2.) Plaintiffs claim that agents from the IRS and FBI as well as United States Attorney Guillermo Gil-Bonar and Assistant United States Attorney Jorge E. Vega-Pacheco appeared before two grand juries and submitted false and erroneous information which produced the indictment against them. Plaintiffs contend that said agents should have known that the information was false and misleading and should have prevented said information from reaching the grand jury, in addition, plaintiffs argue that agent John Johnson led the grand jury to believe that Mr. Nogueras had transferred $24,000,000 through his computer in the Senate to off-shore banks, while knowing said information was false. (Docket No. 1, at 4, ¶ 3.)

As a result of the indictment, plaintiffs were arrested in their respective residences Plaintiff Nogueras was arrested at his home in Puerto Rico and his wife was arrested at her residence in Orlando, Florida. (Docket No. l-at5,¶4.)Plaintiffs allege that at the time of the arrest the United States Attorney summoned the press in advance in order to cover the arrest. They arrested him without a-warrant, which arrived an hour after his arrest. He I was then put into an FBI vehicle to be taken to the district court. (Docket No. 1, at 5, ¶ 5.) Plaintiffs claim that the arrests had an unusual display of excessive force, which included a large number of agents with rifles as well as other weapons. (Docket No. 1, at 5, ¶ 4.) According to the plaintiffs, Mrs. Mojica was also arrested in the same manner as Mr. Nogueras and was taken to a jail in Tampa, Florida. (Docket No. 1, at 5, ¶ 5.)Mr. Nogueras and Mrs. Mojica's daughter, Nicolle Nogueras, was informed by two

FBI agents who went to her school in Orlando that her parents had been arrested. (Docket No.1, at 5, ¶ 6.)

Plaintiffs also argue that at the outset of the trial, 1RS agent Mr. Ronald McKeever, incurred in false statements and misrepresentations that provoked several interventions by the United States Distort fudge Carmen Consuelo Cerezo. Plaintiffs claim that the alleged facts presented by this agent were incomplete, insufficient, incorrect and false. In addition, plaintiffs contend that that same agent also admitted that many important records necessary for Mr. Nogueras' defense had been destroyed. (Docket No. 1, at 5,1 8.) Co-defendants Guillermo Gil-Bonar, John Johnson, Jorge E. Vega-Pacheco and Jose Gonzalez are sued in their individual and/or official capacity due to their alleged negligent and/or intentional conduct during the investigation of the plaintiffs as well as during the federal case against them. As such, plaintiffs claim that the defendants acted outside their statutory authority and discretion, therefore violating plaintiffs' constitutional and statutory rights. (Docket No. 1, at 7,1 13.) Plaintiffs also argue that these defendants violated plaintiffs' constitutional rights under die First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution. (Docket No. I, at 6, II 9.) Furthermore, plaintiffs claim that all defendants acted in furtherance of a conspiracy against them and/or failed to prevent any wrongdoing from occurring to them, while having the knowledge and the power to impede such actions from happening. (Docket No. 1, at 6,1 11.)

II. Analysis

Motions to dismiss come under the rubric of Federal Rule of Civil Procedure 12(b). See Rodriguez v. Fullerton Tires Corp., 115 F. 3d 3), 83 (1st Cir. 1997). Federal Rule of Civil Procedure 12(b)(6) allows a party to seek dismissal of an action based on the plaintiffs "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12 (b)(6). The court must give the complaint a highly deferential reading, accepting the facts therein stated as true and affording all reasonable inferences in the plaintiff's favor. See H.I. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249 (1989); Barrington Cove Ltd. P'ship v. Rhode island House a Mortgage Fin. Corp,. 246 F.3d 1, 4-5 (1" Cir. 2001); Aulson v. Blanchard. 83 F.3d 1, 3 (1st Cir. 1996). This treatment should not be given to unsupportable conclusions and bold allegations or to those statements contradicted by plaintiffs own concessions. See Barrington Cove Ltd. P'ship v. Rhode Island House &. Mortage Fin. Corp.. 246 F.3d at 5. Plaintiffs must set forth "factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery...." Gooley v. Mobil Oil Corp.. 85 J F.2d 513, 515 (1" Cir. 1988). Dismissal is only appropriate when it appears that the plaintiff cannot recover in any viable theory. See Conley v. Gibson. 355 U.S. 41,45-48 (1957); Barrington Cove Ltd. P'ship v. Rhode Island House &.Mortage Fin. Corp., 246 F.3d at 5.

In their motion for reconsideration of magistrate judge's report and recommendation and/or renewed motion to dismiss, defendant United States argues that even though Magistrate Judge Delgado identified three claims that precluded the dismissal of plaintiffs' claims, the same are insufficient to establish probable cause as to the claims of false arrest and malicious prosecution. The

following are the claims identified by Magistrate judge Delgado: (1) that IRS and FBI agents and the United States attorneys appeared before two grand juries and submitted false and erroneous information which produced the indictment; (2) that the wife of an FBI agent was on the first grand jury panel, and the agent discussed with her matters relative to his testimony; and (3) that the FBI agent provided information to the grand jury which he knew to be false regarding a monetary transfer. (Docket No. 87, at 2.) As to the first claim, defendant argues that the allegation that false and erroneous information was submitted to the grand jury does not indicate in any way that such false testimony was given. (Docket No. 87, at 3.) In addition, defendant argues that even if the allegations were true it would not be sufficient to negate probable cause for the arrest and prosecution of the plaintiffs. Thus, defendant contends that since plaintiffs have only proffered conclusory and unsupported allegations, the claims should be dismissed. (Docket No. 87, at 3.)

As to the allegations that an FBI agent had improper contact with a member of the first non-indicting grand jury, defendants claim that this allegation is irrelevant since the grand jury referred to in plaintiffs' allegations was not a member of the indicting grand jury. Thus, the first grand jury could not have affected the indictment returned by the second grand jury because they were completely independent. (Docket No. 87, at 6.) Lastly, defendant argues that in the criminal case District Judge Carmen Cerezo had determined that there was no evidence of prosecutorial misconduct by FBI agent John Johnson during the grand jury investigation of that case. (Docket No. 87, at 7-8.) In respect to plaintiffs' allegation that an FBI agent inappropriately mentioned a $24,000,000

transaction to the first grand jury, defendants also assert that the indicting grand jury did not hear such testimony and therefore could not have been affected by the same. (Docket No. 87, at 8.)

In their motion opposing defendants' motion to dismiss, plaintiffs argue that their allegations are far from being insufficient, conclusory and unsupported by the record. Plaintiffs also contend that it has become law of the case that matters concerning trial determinations or resolutions in the course of the criminal case will not have a collateral effect as to the matters being put before this court. Thus, plaintiffs contend that the principal issue put forth before this court is whether the United States engaged in malicious prosecution against the plaintiffs rather than establish whether the first or the second grand jury caused the return of the indictment against the plaintiffs. Hence, plaintiffs claim that the alleged prosecutorial activity of the defendants cannot be abstracted as pertaining to either of the grand juries but rather that the effect of the two was consecutive and accumulative in reflecting the real intention behind the misconduct of the defendants against the plaintiffs. (Docket No. 98, at 12, fl 22.)

Plaintiffs filed a second amended compliant attached to their motion in opposition to defendants motion to dismiss, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671 -2680, claiming false arrest, malicious prosecution, and abuse of process based on the actions taken by the FBI and 1RS agents as well as that of co-defendants Gll-Bonar and Vega-Pacheco. (Docket No. 98.) Plaintiffs claim that co-defendant Guillermo Gil-Bonar in concert with FBI agent John Johnson allowed to have in one of the grand jury investigations convened against plaintiff Nogueras, a consensual wife of said agent and that

she discussed with him matters of the investigation. In addition, plaintiffs allege that said
agent also went out with co-defendant Guillermo Gil-Bonar and Comptroller Ileana Col6n Carlo due to a friendly and personal relationship they all shared. (Docket No. 97, at 9, ¶ 20.) Plaintiffs argue that this is relevant since it was the comptroller who seized Nogueras' computer from his office £t the Senate. (Docket No. 97, at 10-11, H 20.) Furthermore, plaintiffs claim that agent Johnson and co-defendant Gil-Bonar knew that Nogueras had nothing to do with the $24,000,000 transaction that appeared in his computer but nevertheless provided the grand jury such information. (Docket No. 98. at 7. ¶19.) Hence, plaintiffs assert that co-defendant Gil-Bonar and agent Johnson purposely withheld information from the grand jury that led them to believe that the Comptroller Colón found that Nogueras had carried out a $24,000.000 transaction transferring the funds to different pans of the world. (Docket No. 97, at 11, ¶ 20.)

In plaintiffs' second amended complaint, the first cause of action is against defendant United States of America due to the actions allegedly carried out by United States Attorney Guillermo Gil-Bonar and Assistant United States Attorney Jorge Vega-Pacheco and IRS agents John Johnson and Jose" E. Gonzalez against plaintiffs Nicolas Nogueras Cartagena and Abigail Mojica Escobar. As a result of the alleged intentional and/or negligent infliction of emotional distress by these government agents, plaintiffs sustained serious emotional and mental anguish as well as physical damages. (Docket No. 98, at 14, ¶ 2.) In addition, plaintiffs claim pain and mental suffering on behalf of their daughter Nicolle

Nogueras Mojica, plaintiff Nicolás Nogueras's mother, plaintiff Berta Cartagena, and plaintiff's Abigail Mojica's father, plaintiff Daniel Mojica, against defendant United States of America. (Docket No. 98, at 15.) As to all the other defendants, plaintiffs claim that the defendants, as federal officers and agents, by engaging in their negligent and/or intentional conduct mentioned before: (1) violated plaintiffs' substantive due process; (2) violated plaintiffs Nicolas Nogueras Cartagena and Abigail Mojica Escobar's right to be free from any unreasonable search and seizure, resulting in their arrest pursuant to a warrant predicated on false information by government agents; (3) intentionally or negligently inflicted emotional distress on all plaintiffs; (4) violated clearly established statutory and constitutional rights of which a reasonable person would have known; and (5) made an improper use of process for an immediate purpose other than that for which it was designated and intended. (Docket No. 98, at 17, ¶ 4.) In the alternative, plaintiffs claim that as federal officers co-defendants acted outside the scope of their statutory authority and discretion or their individual capacity, or in their official capacity in violation of clearly established constitutional and statutory rights mentioned above. (Docket No. 96, at 17, ¶ 10.)

Defendant United States moves to dismiss plaintiffs' second amended complaint under Federal Rule of Civil Procedure 12b(6) for failure to state a claim upon which relief can. be granted, on the same grounds presented in their renewed motion to dismiss. (Docket No. 99.) Defendant United States argues that as to plaintiffs' claims of false and malicious prosecution they have failed to set forth facts that, if proved, would show lack of probable cause for the arrests and prosecution of

plaintiffs. (Docket No. 99, at 1.) Also, as to their abuse of process claim, defendant argues that plaintiffs have not alleged any well-pled facts showing that the FBI or IRS agents had an ulterior motive in investigating Nogueras, or that they committed an "act of abuse," both which require elements of an abuse of process claim, in sum, defendant contends that since plaintiffs' allegations of false arrest, malicious prosecution and abuse of process fail to state a viable claim, their Federal Tort Claims Act claims should be dismissed in its entirety. (Docket No. 99, at 2.)

Defendant United States filed a motion supplementing its motion to dismiss pursuant to Federal Rule of Civil Procedure I2(b)(1) and I2(h)(3) asserting as an additional and independent ground for dismissal that plaintiffs filed this action prematurely in contravention of 28 U.S.C. § 2675(a). Defendant claims that plaintiffs filed this action less than six months after filing their administrative tort claims with the Internal Revenue Service and before the IRS notified plaintiffs in writing that their claim had been denied. (Docket No. 111, at 1.) Accordingly, defendant argues that due to plaintiffs' failure to exhaust their administrative remedies deprives the court of subject matter jurisdiction and therefore plaintiffs Federal Tort Claims Act claims should be dismissed. (Docket No. 111, at 1-2.)

Co-defendants Gil-Bonar and Vega-Pacheco in their response, to plaintiffs' motion in opposition to United Stares renewed motion to dismiss and submitting second amended complaint, argue that the court granted plaintiffs leave to amend their complaint regarding a narrow scope. The court granted leave as to the amended complaint filed by the plaintiffs regarding the abuse of process as alleged against the investigative or law enforcement officials

only.[1] (Docket No 100, at 2.) Thus, co-defendants assert that the only claims that remain as viable are the false arrest and malicious prosecution allegations brought pursuant to the Federal Tort Claims Act against the United States, for the actions of the FBI and IRS agents and the Bivens claim for violation of plaintiffs' federal constitutional rights against United States Attorney Gil, Assistant United States Vega, and FBI agent Johnson. (Docket No. 100, at 3). In sum, co-defendants claim that plaintiffs have usurped the court's order granting a very narrow leave to amend by incorporating their entire amended complaint and adding numerous false and vicious and prejudicial allegations regarding defendants Gil and Vega. (Docket No. 100, at 3). In the alternative, co-defendants assert that if the court should allow plaintiffs second amendment complaint, then they reserve their right to file a motion to dismiss said complaint. Co-defendants support their motion to dismiss on the following arguments: (1) plaintiffs have not obtained an order of the court or consent of opposing parties allowing them to file a second amended complaint against co-defendant Gil-Bonar and Vega-Pacheco; and (2) plaintiffs' motion will not survive a motion to dismiss even assuming arguendo that the plaintiffs' motion to amend its complaint complied with the prerequisite of federal rules of civil procedure and case law. (Docket No. 100, at 4-7).

III. The Bivens Claim and the Qualified Immunity

In determining whether a defendant is entitled to qualified immunity defense as to plaintiffs' Bivens claim, the court must first determine whether an actual deprivation of plaintiffs' constitutional rights ocurred and secondly whether that right was clearly established at the time of the alleged violation. Abreu

Guzmán v. Ford, 241 F.3d 69, 73 (1st Cir. 2001). The ultimate question then is "whether an objectively reasonable officer, performing discretionary functions, would have understood his or her conduct violated that clearly established constitutional rights." Id. See also Harlow v. Fitzgerald, 457 US 800, 818-19(1982); Crawford El v. Britton, 523 US 574, 591 (1998). "It has been clearly established for a very long time that the Fourth Amendment requires that arrests be based on probable cause." Abreu-Guzmán v. Ford, 241 F.3d at 73. "When officers make an arrest subject to a warrant, then, even if probable cause is lacking, officers are entitled to qualified immunity "unless the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." Id. (quoting St. Hilaire v. Laconia, 71 F.3d 20, 28 (1st Cir. 1995), quoting Malley v. Briggs, 475 US 335, 344-45 (1986) (footnote omitted).

In this case the grand jury returned an indictment finding probable cause against plaintiff Nicolás Nogueras Cartagena for conspiring to defraud the United States by impeding and defeating the IRS's evaluation and collections of taxes, interest, and penalties under 18 U.S.C. § 371; aiding and abetting a violation of the Ethics in Government Act relating to Tones" representation of the plaintiffs before the IRS on a matter in which Torres had previously participated as an IRS official, 18 U.S.C. § 207(a); structuring financial transactions to avoid reporting requirements, 31 U.S.C. § 5324(a)(3); and making false statements, 18 U.S.C. § 1001. (Docket No. 1, at 4, ¶ 2.) Plaintiffs have failed to contest these facts upon which the indictment was issued and which provided probable cause for plaintiffs' arrest. Even if plaintiffs' allegations were to be considered as true it would not change the fact that the grand jury

found probable cause to arrest and charge plaintiffs for their illegal conduct and defendants acted upon this belief. From the evidence presented and upon which the indictment was issued, a reasonable officer could believe that probable cause did exist in order to arrest and prosecute the plaintiffs. Therefore, defendants are entitled to qualified immunity as a matter of law on plaintiffs' *Bivens* claim. Abreu-Guzmán v. Ford. 241 F.3d at 75.

IV. Federal Tort Claim Act Claims

"Under the Federal Tort Claims Act, the United States waives its sovereign Immunity for 'injury or loss or property ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'" Abreu-Guzman v. Ford. 241 F.3d at 75 (quoting 28 U.S.C. § 1346(b)). The Federal Tort Claims Act allows actions against the United States for claims of '"assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution' arising out of 'acts or omissions of investigative or law enforcement officers of the United States Government.'" Id. (quoting28 U.S.C. § 2680(h)), "The FTCA ordains that 'the law of the place[1] where the act or omission occurred shall govern actions for damages against the United States." Rodriguez v. United States. 54 F.3d 41, 44 (1st Cir. 1995) (quoting 28 U.S.C. §1346(b)). Since all material acts and omissions in this case occurred in Puerto Rico, Puerto Rico law will dictate the resolution of the claims against the defendants. Abreu-Guzman v. Ford. 241 F.3d at 75.

"Under Puerto Rico law, false arrest and false

imprisonment claims share identical elements and focus on whether the arresting officers 'lacked reasonable cause for believing that, [the suspect] committed a felony." Id. (quoting Harrington v. United States. 748 F. Supp. 919,933 (D.P.R. 1990)). In a malicious prosecution claim the plaintiff has to show that the defendant acted with malice and without probable cause, "defined as a suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.'" Abreu-Guzman v. Ford. 241 F.3d at 75, (quoting Lora- Rivera v. Drug Enforcement Admin. Dep't of Justice. 800 F. Supp.1049, 1051-52 (D.P.R.1992)). While plaintiffs have presented numerous allegations of malicious conduct by the defendants, the same are speculative, unsupported by the record and unable to withstand the specificity requirement set forth in Federal Rule of Civil Procedure 12(b)(6). in addition, since the agents as well as the prosecutors that carried out the investigation and arrest of the plaintiffs had an objectively reasonable belief that there was probable cause to arrest and prosecute the plaintiffs, their actions fail to violate plaintiffs' constitutional right under the Fourth Amendment. Consequently, this determination "extinguishes any basis for finding liability for False arrest, false imprisonment, or malicious prosecution." Abreu-Guzman v. Ford. 241 F.3d at 75.

In view of the above, I recommend that the motion to dismiss of defendants United States, co-defendant Gil-Bonar, Vega-Pacheco and John Johnson be GRANTED.

Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto –with

the Clerk of this Court within ten (10) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Am. 474 U.S. 140, 155 (1985) reh'g denied, 474U.S. 1111 (1986): Davet v. Maccorone. 973 F.2d 22,30-31 (l"Cir. 1992): Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Or. 1988); Borden v. Secretary of Health a Human Servs.. 836 F.2d 4, 6 (1st Or. 1987); Scott v. Schweiker. 702 F.2d 13, 14 (1n Cir. 1983); United States v. Vega. 678 F.2d 376.378-79 (1st Cir. 1982); Park Motor Mart. Inc. v. Ford Motor Co., 616 F.2d603(1st Cir. 1980).

At San Juan, Puerto Rico, this 18th day of September 2002.

Signed by JUSTO ARENAS
JUSTO ARENAS
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Received and Filed 01 Sep 13
Clerk's Office]

NICOLAS NOGUERAS CARTAGENA, ABIGAIL MOJICA ESCOBAR, NICOLLE NOGUERAS-MOJICA, BERTA CARTAGENA and DANIEL MOJICA
Plaintiffs
v.

UNITED STATES OF AMERICA, GUILLERMO GIL-BONAR, JORGE VEGA PACHECO, JOHN JOHNSON, and JOSE E. GONZALEZ
Defendants

CIVIL NO. 00-1778 (DRD)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Now before the Court are the United States of America's Motion to Dismiss, plaintiffs' Motion for Partial Summary Judgment and the United States of America's Motion for Substitution and responses thereto (Docket Nos. 14, 18, 21, 25, 26, 29, 30,31,36,57, 58). The motions were

referred to the undersigned for report and recommendation (Docket No. 45). Plaintiffs filed their complaint on June 21, 2000 (Docket No. 1). An amended complaint was filed on October 18, 2000, raising tort claims pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, and a Bivens claim alleging that the individually named defendants violated the constitutional rights of the plaintiffs (Docket No. 4). See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388.

The United States of America moves the Court for an order substituting the United States as defendant for the individually named defendants for the claims brought pursuant to the Federal Tort Claims Act (FTCA) (Docket No. 36). Plaintiffs object to the motion to substitute (Docket No. 57). The United States also moves for dismissal, with prejudice, of all state common-law claims against the individual defendants. Id. Additionally, the United States seeks dismissal of the claims brought pursuant to the FTCA for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted[1] (Docket No. 14). Finally, plaintiffs move for partial summary judgment against defendant Guillermo Gil, United States Attorney, and the United States for damages as a result of the gross negligence of U.S. Attorney Guillermo Gil (Docket No. 29).

I. THE AMENDED COMPLAINT

Plaintiffs Nicolas Nogueras-Cartagena ("Nogueras"); his spouse, Abigail Mojica-Escobar ("Mojica"); their daughter,

Nicolle Nogueras-Mojica ("Nicolle"); Nogueras' mother, Berta Cartagena ("Mrs. Cartagena"); and, Mojica's father, Daniel Mojica ("Mr. Mojica") filed a complaint on June 21,2000 and an amended complaint on October 18, 2000 (Docket Nos. 1, 4). The amended complaint is brought pursuant to FTCA, 28 U.S.C. § 1346 (b), and also alleges violations of constitutional rights. Named as defendants are the United States of America (United States), United States Attorney Guillermo Gil-Bonar ("Gil"), Assistant United States Attorney Jorge Vega-Pacheco ("Vega"), FBI Agent John Johnson ("Johnson") and IRS Agent Jose E. Gonzalez ("Gonzalez"). Gonzalez's case was dismissed without prejudice on May 7, 2001, for lack of service of process. *See* Docket No. 44.

Counts One, Two, Three and Four[2] brought against the United States pursuant to the FTCA include allegations of false arrest, malicious prosecution, abuse of process, negligent investigation and infliction of emotional distress resulting from the tortuous actions of the defendants. Count Five alleges a violation of the plaintiffs' constitutional rights under the First, Fourth, Fifth and Fourteenth amendments of the United States Constitution and is brought against the individual defendants in their official and individual capacities. Although the Amended Complaint does not specifically state it, Count Five is a claim brought pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1911), which provides an avenue of relief when individuals' allege violations of federal rights by federal officers. Plaintiffs

FBI agents on April 24, 1996, in Puerto Rico and Orlando, Florida, respectively. Id. at fl 4. The arrests were attended by the press who were summoned in advanced by Gil, with said arrests transmitted live. *Id.* at ff 5. Nogueras was initially arrested without a warrant as he was held for over an hour by IRS and FBI agents until an arrest warrant arrived. *Id.* at fl 5. While Nogueras and Mojica were being arrested, FBI agents traveled to the high school of Nicolle, located in Florida, and advised her that both her parents had been arrested. Id at H 6. Nicolle, and her grandparents, Mrs. Cartagena and Mr. Mojica, all had adverse emotional reactions to the arrests. *Id.*

Trial commenced on May 11, 1999. Id. at fl 7. During trial, it is alleged, IRS agent Ronald McKeever[5] provided false statements and misrepresentations and presented incomplete, insufficient, incorrect and false facts. Id. at fl 8. Agents admitted that many important records necessary for Nogueras' defense had been destroyed. *Id.*

U.S. Attorney Gil formally requested dismissal of all charges, with prejudice, on June 22, 1999, prior to the time the third government witness was to be called to testify. *Id.* at fl 9. All defendants consented to the request for dismissal. *Id.* Prior to making said request, U.S. Attorney Gil had requested a continuance of trial in order to verify information concerning the possibility that an appeal had been filed by Nogueras protesting the 100 % penalty imposed by the IRS for tax periods ending December 31,1984 and March 31, 1985, in the sum of $84,397.71 and $104,296.69, respectively. *Id.; Ex.*, Criminal No. 96-104(CCC),

allege deprivation of their constitutional right to due process and equal protection, the right to be free from unreasonable search and seizure, the pursuit of their liberty, property, profession and freedom of speech and association.

The complaint alleges as follows: On April 24, 1996, an indictment was filed in Criminal Case No. 96-104(CCC) against Nogueras and Mojica, as well as Jose M. Torres-Dueño[3] for the offenses of conspiracy to defraud the United States, aiding and abetting, graft and conflict of interest-bribery, structuring transaction to evade reporting requirements and statement or entries generally, all in violation of Title 18U.S.C. §§371, 207(a), 1001,2 and Title 31 U.S.C. § 5324(a)(3)[4] (Docket No. 4, Facts ¶ ¶1,2). IRS and FBI agents as well as United States attorneys appeared before two grand juries providing incomplete, erroneous and false evidence which resulted in the indictment. *Id.* at ¶¶ 2,3. In the complaint it is also claimed that the agents knew or should have known of the misleading false and erroneous nature of the information, concealing the fact from the Grand Jury together with Gil and Vega, *Id.* at fl 3. It is alleged that the first Grand Jury panel was composed of the consensual wife of Johnson with whom Johnson discussed matters relative to evidence presented to the Grand Jury. *Id.* Further, the complaint states that Johnson provided false information to the Grand Jury by leading them to believe that Nogueras had transferred $26 million to off-shore banks via his Senate computer. *Id.*

Nogueras and Mojica were publicly arrested by IRS and

Docket No. 351. The criminal prosecution was based on the fact that Nogueras had never challenged or appealed the debt (Docket No. 4), *Ex.*, Criminal No. 96-104(CCC), Docket No. 351.

The next day, on June 23, 1999, Gil, while in court, formally requested dismissal of all charges, with prejudice. Id. At said time Gil made reference to the existence of an appeal filed by Nogueras which had been kept in a revenue officer's personal file which was not known to him. *Id.*

The trial court concluded that the alleged facts in the indictment were incomplete, insufficient and plainly incorrect due to the negligent handling of the case file and appeal papers by IRS and FBI agents. *Id.* Said agents were grossly negligent in their performance and duties as investigative and law enforcement officers as were Gil and Vega in their investigation and the handling of the case. *Id.* All criminal charges were dismissed and written orders entered by the Court.

Attached to the Amended Complaint are two court orders entered in the underlying criminal case; one entered July 9,1999 and the other entered June 25,1999. The June 25th order, states, "Mr. Gil's disclaimer of knowledge and his statement that he was "led to believe" that there was no appeal, have no factual support; the existence of the appeal is contained in his own evidence. One can reasonably expect prosecutors to read their own evidence. . . . This denotes gross negligence by Mr. Gil in the discharge of his investigative duties as the Chief Officer of the U. S. Attorney's Office and as the prosecutor who personally handled this case with the assistance of Mr. Jorge Vega-Pacheco."

The plaintiffs now seek from the United States, pursuant to the FTCA, the following amounts: Nogueras and Mojica each seek $10 million in damages; Nicolle seeks $5 million; and, Mrs. Cartagena and Mr. Mojica each seek $1 million in damages. The plaintiffs also seek compensatory damages from the individual defendants for the alleged constitutional violations.

II. MOTION FOR SUBSTITUTION

Under the FTCA, the United States waives its sovereign immunity for "injury or loss of property... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b). The FTCA provides the exclusive remedy to compensate for a federal employee's tortuous acts committed within his or her scope of employment. *See 28* U.S.C. §2679(a).

The United States moves for an order substituting the United States as defendant for the individually named federal defendants for all state common-law claims against said individual defendants, inasmuch as plaintiffs' exclusive remedy for state common-law torts under the FTCA is solely against the United States (Docket No. 36). Plaintiffs object to the substitution.

The Federal Employees Liability Reform and Tort Compensation Act of 1988, amended the FTCA. The amendments, more commonly known as the "Westfall Act." grant federal employees broad immunity from state law suits based upon

common law tort claims. See 28 U.S.C. § 2679(b)(l). Additionally, Congress provided a mechanism for determining when federal employees are acting within the scope of employment, and thus are personally immune from suit.

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.
>
> 28 U.S.C. §2679(d)(l).

Once such a certification is made, the court dismisses the federal employee from the case, and substitutes the United States as defendant. *Davric Maine Corp. v. United States Postal Serv.*, 238 F.3d 58, 65 (1st Cir. 2001). The certification, however, "does not conclusively establish that the United States should be substituted, but rather is provisional and subject to judicial review." *Id.; See also Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995). "Where a plaintiff asserts that a defendant acted outside the scope of his or her employment despite the Attorney General's certification to the contrary, the burden of proof is on the plaintiff to show that the defendant was not acting within the scope of employment. Id. at 66; *See also Day v. Massachusetts Air Nat'l Guard*, 167 F.3d678,

685 (1st Cir. 1999). "Upon a showing that the employee was acting outside the scope of employment, as determined by the applicable state law, that employee may be re-substituted." *Id.* (citing *Aversa v. United States*, 99 F.3d 1200, 1208 (1st Cir. 1996)). When the United States is properly substituted in a case for an individual defendant under the "Westfall Act," then the state claims against that defendant are barred under the "Westfall Act" itself. *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 685 (citing 28 U.S.C.§2679(d)).

Attached to the United States' motion is a Certification by the Attorney General that the individual defendants Gil, Vega, Johnson and Gonzalez were acting within the scope of their employment as employees of the United States at the time of the alleged conduct in the Amended Complaint. The burden is now on plaintiffs to show the individual defendants were acting outside the scope of their employment. Plaintiffs oppose the substitution arguing that attorneys Gil and Vega were not acting within the scope of their employment as they were not forwarding government interests, the litigation was brought for personal motives, and the United States was negligent for the actions of the attorneys. Plaintiffs point to the Model Rules of Professional Conduct and the Local Ethics Canons, as well as the United States Attorney Manual in support of their position.

The undersigned determines, however, that plaintiffs have not met their burden of proof. Plaintiffs focus on Gil and Vega but make no argument as to the other governmental employees. Plaintiffs focus on the "questionable prosecutorial practices" of attorneys Gil and Vega which, as alleged, were geared to destroy plaintiffs

reputation. While plaintiffs may believe these attorneys violated the Rules of Professional Conduct, Local Ethics Canons, and certain United States Attorney Manual articles, same does not fulfill the burden of proving Gil and Vega were not acting within the scope of their employment. Moreover, the Attorney General has certified that Gil, Vega, Johnson and Gonzalez were acting within the scope of their employment. Plaintiffs have submitted nothing other than argument to meet their burden of proof.

Accordingly, the undersigned RECOMMENDS that the Motion for Substitution (Docket No. 36) be GRANTED and that the United States of America be substituted for defendants Gil, Vega, Johnson and Gonzalez as the proper defendant. It is further RECOMMENDED that all Puerto Rico common law claims as alleged in the Amended Complaint against the individual defendants Gil, Vega, Johnson and Gonzalez be DISMISSED with prejudice as the exclusive remedy for same is provided for in the FTCA with the United States as the defendant.

This recommendation has no bearing upon the *Bivens* claims for violation of plaintiffs' constitutional rights brought against the defendants Gil, Vega, Johnson and Gonzalez in their individual and official capacities as found in Count Five of the Amended Complaint. At this juncture, said claims remain viable.

III. MOTION TO DISMISS

The United States moves to dismiss claims raised pursuant to the FTCA on the following bases: 1) those claims based upon the prosecutors' conduct are barred because they fall outside the United States' limited waiver of sovereign immunity under

the FTCA; 2) the negligent investigation claims are jurisdictionally barred by the discretionary function exception to the FTCA; and, 3) and the false arrest, malicious prosecution claim and abuse of process claims fail to state a claim under Puerto Rico law (Docket No. 14). Plaintiffs contend dismissal is not proper as defendants are collaterally estopped to contest the allegations contained in the complaint due to orders entered by the Court in the underlying criminal case. Further, plaintiffs claim that the Court is not required to dismiss claims alleging conduct which might fall within the intentional torts exception to FTCA claims. Finally, as to the claims of negligent investigation, plaintiffs assert that Gil and Vega are not shielded by 28 U.S.C. § 2680(h)[7].

A. STANDARD

When deciding whether to dismiss a complaint for lack of subject matter jurisdiction pursuant to Fed.R.Civ.P. 12(b)(1), courts "may consider whatever evidence has been submitted, such as the depositions and exhibits submitted . . ." *Aversa v. United States*, 99 F.3d 1200, 1210 (1st Cir. 1996). Additionally, dismissal is proper pursuant to Fed.R.Civ.P. 12(b)(6) on the basis of "failure to state a claim only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45, 48 (1st Cir. 2000) (quoting *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49,52 (1 st Cir. 1990)). The Court accepts as true the well-pleaded factual allegations of the complaint, draws all reasonable

inferences therefrom in the plaintiff's favor, and determines whether the complaint, so read, sets forth facts sufficient to justify recovery on any cognizable theory. See *LaChapelle V.Berkshire Life Ins. Co.*, 142F.3d507,508 (1st Cir. 1998). "Because only well pleaded facts are taken as true, [the Court does] not accept a complainant's unsupported conclusions or interpretations of law." *Washington Legal Found. v. Massachusetts Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993).

B. Federal Tort Claims Act

Pursuant to the FTCA the United States waives its sovereign immunity for "injury of loss of property... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. §1346 (b) The FTCA exempts intentional torts from its sovereign immunity waiver but expressly allows actions against the United States for claims of 'assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" arising out of "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680 (h).

Under the FTCA it is the plaintiff's burden to prove the existence of subject matter jurisdiction. *Murphy v. United States*, 45 F.3d 520,522 (1st Cir. 1995). "The FTCA ordains that the 'law of the place' where the act or omission occurred shall govern

actions for damages against the United States." *Rodriguez v. United States*, 54 F.3d 41, 44 (1st Cir. 1995). Virtually all of the acts alleged, save the arrest of Mojica and advising Nicolle of her parents' arrests, took place in Puerto Rico. Hence, Puerto Rico substantive law is applied to the claims brought pursuant to the FTCA.

1. Collateral Estoppel

Plaintiffs argue that orders entered by the Court on June 25, 1999 and July 9, 1999, in the underlying criminal case create collateral estoppel which precludes the United States from challenging its conduct and the conclusions of the Court in the criminal case. The United States responds that plaintiffs' reliance on the orders is misplaced for the following reasons: the United States' motion to dismiss is based in significant part on the issue of lack of subject matter jurisdiction; the orders in the criminal case do not have
estoppel effect because the issues in the civil case were not fully and fairly litigated in the criminal case and were not subject to a final judgment; and, the issue of whether to grant dismissal of the indictment was a narrow one.

It is plaintiffs' position that certain statements and findings by the Court in the criminal matter "create a collateral estoppel against the Government to plead otherwise before this Court" as to the adjudicated matters on the issue of "gross negligence" by Gil and Vega, the statement by the Court that "this prosecution should not have been initiated," and that the government destroyed records during the criminal investigation. Before delving any further into these issues, the undersigned

initially notes that subject matter jurisdiction must first be established. Because federal courts are courts of limited jurisdiction, federal jurisdiction is never presumed. *Viqueira v. First Bank*, 140F.3d 12,16 (1st Cir. 1998). Instead, plaintiffs must carry the burden of demonstrating the existence of federal jurisdiction. *Id.*; *See Aversa v. United States*, 99 F.3d 1200, 1209 (1st Cir. 1996); *Murphy v. United States*, 45 F.3d 520,522 (1st Cir. 1995). As seen below in Section III.B.2.a. and B.3, with regard to the action or inaction taken by Gil or Vega, there is no subject matter jurisdiction under the FTCA. Hence, there is no need to discuss collateral estoppel as it applies to the criminal orders stating that their actions constituted negligence or gross negligence.

The undersigned now turns to the two other areas that plaintiffs assert the United States is collaterally estopped from contesting; that the criminal prosecution should not have been initiated and that the government destroyed records during the criminal investigation. "The principle of collateral estoppel, or issue preclusion, bars relitigation of any factual or legal issue that was actually decided in previous litigation 'between the parties, whether on the same or a different claim.'" *Keystone Shipping Co. v. New England Power Co.*, 109 F.3d 46, 51 (1st Cir. 1997) (citations omitted). "When the parties in a subsequent action are the same as those in a prior one, a party seeking to invoke the doctrine of issue preclusion must establish four essential elements: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final

judgment; and (4) the determination of the issue must have been essential to the judgment." *Id.* (citations omitted).

Plaintiffs allege that investigative or law enforcement officers committed the torts of false arrest, malicious prosecution and abuse of process. In responding to the United States' motion to dismiss plaintiffs contend that the following statement contained in the June 25th trial court order is considered an "adjudicated matter."

> For the reasons stated, the Court GRANTS the Request for Dismissal of the Indictment, with prejudice, against all three defendants made by U.S. Attorney Guillermo Gil in open court on June 25, 1999 and hereby terminates a prosecution which should never have been initiated.

Criminal No. 96-104(CCC) (Docket No. 351).

Apparently plaintiffs believe that this statement goes to the issues of false arrest, malicious prosecution and abuse of process. Having thoroughly reviewed the June 25th order, it is clear that collateral estoppel is inapplicable to the aforementioned statement and the issues in this civil action. First, the issues in this proceeding and that in the criminal matter are not the same. In the criminal matter, the issue decided by the Court was whether to dismiss, with prejudice, the indictment. Here, the issue is whether the United States has committed the torts of

false arrest, malicious prosecution, and abuse of process. Also, the issues of false arrest, malicious prosecution and abuse of process found in this civil matter were not actually litigated in the criminal matter. Indeed, while the presiding judge states the prosecution should not have been initiated, there *is* no discussion whatsoever of the essential elements of false arrest, malicious prosecution or abuse of process discussed hereinafter. Finally, the statement certainly was not essential to the judgment dismissing the criminal action.

Plaintiffs next assert that the July 9, 1999, order establishes that the government destroyed some records of plaintiffs during the course of the criminal investigation. According to the July 9th Order, at some point in time IRS documents relevant to the plaintiffs' criminal defense were destroyed; either after a seven-year shelf life or three years after the IRS case was closed from the group. The July 9th Order states that the testimony provided by a criminal investigator for the IRS casts a dark cloud as to the circumstances of the destruction of records. With regard to whether some records were destroyed during the course of the criminal investigation, the Court stated that "this points to the existence of the missing documents during the criminal investigation and not to their prior destruction as claimed."

Once again the undersigned takes note that the issues raised in the case at bar -whether the United States committed the torts of false arrest, malicious prosecution, and abuse of process are not the same issues litigated in the criminal case.

While the Court in the underlying criminal case certainly addressed the issue of document destruction, said issue was not actually litigated in the criminal matter. The issue was addressed as a result of a response filed by the government to the Court's June 25, 1999, order. [*See* Criminal 96-104(CCC), Docket Nos. 351, 353.] Also of note is that there was no determination of document destruction by a valid and binding final judgment. A final judgment was
entered on the dismissal of the criminal action. The Court, however, precluded the United States from filing any pleadings contesting the Court's July 9, 1999, order and consequently, the government could not fully and fairly litigate the issue nor obtain a valid and binding judgment on the issue. Hence, it is clear that the requisites of collateral estoppel have not met.

Based upon the foregoing analysis, the undersigned concludes that collateral estoppel is inapplicable to the issues raised in this civil cause of action.

2. False Arrest, Malicious Prosecution, Abuse of Process

Plaintiffs raise claims of false arrest, malicious prosecution and abuse of process asserting that these torts were committed by Gil, Vega, Johnson and Gonzalez. As to Gil and Vega it is quite clear that the Court has no subject matter jurisdiction over actions allegedly committed by them.

a. Prosecutors

It is well established that the conduct of federal prosecutors may not serve as a basis for malicious prosecution, false arrest

and abuse of process claims against the United States. Indeed, U. S. attorneys and their assistants who prosecute are not investigative or law enforcement officers as defined by § 2680(h) of the FTCA. The FTCA provides that

> The provisions of this chapter and section 1346(b) of this title shall not apply to -
> Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the dateof the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.
> 28U.S.C.§2680(h).

U. S. Attorneys are not "investigative or law enforcement officers" for purposes of, § 2680(h). *Wright v. United States*, 719

F.2d 1032, 1034 (9th Cir. 1983). Quite simply, dismissal is proper when claims for malicious prosecution, false arrest and abuse of process are brought against federal prosecutors. See *Moore v. United States*, 213 F.3d 705,709-710 (D.C.Cir.), cert, denied,-U.S.-, 121 S.Ct. 426(2000), *Bernard v. United* States, 25F.3d98,104 (2dCir. 1994); Amesv. [fiufedStates.600F.2d 183, 195n.3 (8thCir, 1979); *Warev. United States, 838 F.Supp.* 1561,1563-64 (M.D.F1.1993); *Dirienzo v. United States*, 690 F.Supp. 1149, 1158 (D.Conn. 1988). Accordingly, there is no jurisdiction for these, claims brought as a result of the action of prosecutors Gil and Vega and plaintiffs may not seek redress for any of their alleged conduct for malicious prosecution, abuse of process and false arrest. It is therefore RECOMMENDED that the Motion to Dismiss (Docket No. 14) be GRANTED for lack of subject matter jurisdiction as to allegations raised against Gil and Vega for false arrest, malicious prosecution and abuse of process.

b. Investigative or Law Enforcement Officers

FBI agent Johnson and IRS agent Gonzalez are properly identified as investigative or law enforcement officers and as such it is specifically provided that a cause of action may lie against the United States for their alleged actions. 28 U.S.C. § 2680(h). The United States argues, however, that because there was probable cause for the indictment and no evidence of malice, plaintiffs have failed to state a claim for false arrest, malicious prosecution, and abuse of process. Plaintiffs rebut that argument by asserting that IRS and FBI agents gave incomplete and incorrect information and testimony to the Grand Jury and the

U.S. Attorney.

The undersigned now turns to Puerto Rico law to determine if plaintiffs have stated a cause of action thereunder. Under Puerto Rico law "an officer may arrest an individual if 'he has reasonable cause for believing that the person about to be arrested has committed a felony, regardless of whether or not the said offense was in fact committed."[1] *Rodriguez v. United States*, 847 F.Supp. 231,234 (D.P.R. 1993) (quoting P.R.Laws Ann. tit. 34, App. II, Rule 11: Change of Plea 11.) "'Reasonable cause' has been defined as a 'suspicion founded upon circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true." *Id.* (citations omitted). Additionally, an indictment "fair" upon its face, and returned by a properly constituted grand jury, conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." *Cerstein v. Pugh*, 420 U.S. 103, 117 n. 19 (1975).

The tort of malicious prosecution consists of four elements: 1) that a criminal action was initiated and instigated by defendants; 2) that the criminal action terminated in favor of plaintiffs; 3) that defendants acted with malice and without probable cause; and 4) that plaintiffs suffered damages. *Iora-Rivera v. Drug Enforcement Admin.*, 800 F. Supp. 1049, 1051 (D.P.R. 1992) (citations omitted). "An indictment 'fair upon its face' and returned by a 'properly constituted grand jury' conclusively determines the existence of probable cause...." Id. (citations omitted). "An indictment is sufficient to try a

defendant on the counts charged therein, and satisfies the requirements of the Fifth Amendment, and it cannot even be challenged on the ground that it is based on inadequate or incompetent evidence." *Id.* (citations omitted).

In reviewing the law it is clear that the United States is correct in arguing that a grand jury indictment supplied the requisite probable cause to support the arrest and prosecution of the plaintiffs. The United States argues that the allegations in the amended complaint do not deny that Nogueras owed the IRS taxes and penalties as alleged, that he failed to pay taxes and penalties or that the defendants sought to avoid paying such tax liabilities. The United States also argues that the amended complaint does not deny that Nogueras hired Mr. Torres, a co-defendant in the underlying criminal matter, to represent him before the IRS in a tax case that Torres personally supervised while serving as IRS Branch Chief in Puerto Rico or that Nogueras structured a bank transaction to avoid financing transaction reporting requirements. The United States, however, fails to address the allegations in the complaint that an indictment was returned due to the presentation of false information and the possible tainting of a grand juror. Specifically, the amended complaint alleges that agents of the ERS and the FBI as well as U.S. Attorneys appeared before two grand juries and submitted, false and erroneous information which produced the indictment. Also, the amended complaint alleges that the wife of FBI agent Johnson was on the first grand jury panel and he discussed with her matters relative to his testimony before the grand jury. The

amended complaint further alleges that Johnson provided information to the grand jury regarding a monetary transfer which he knew to be false. More, the undersigned notes that in the underlying criminal matter plaintiffs challenged portions of the indictment. See Criminal No. 96-104(CCC), Docket No. 107.

Plaintiffs alleged facts in their amended complaint sufficient to rebut the finding of probable cause by the grand jury and that the indictment was fair upon on its face (i.e., agents knowingly providing false information; tainted grand juror). At the dismissal stage the Court accepts as true the well-pleaded factual allegations of the complaint and draws all reasonable inferences therefrom in the plaintiffs' favor. Therefore, it is RECOMMENDED that the Motion to Dismiss (Docket No. 14) as to the allegations of the actions of the investigative and law enforcement officer (Johnson) for false arrest and malicious prosecution be DENIED.

The United States also argues that plaintiffs' claim for abuse of process fails under Puerto Rico law as plaintiffs have not alleged that any investigative or law enforcement officers had a "bad" or "ulterior" motive in conducting the prosecution, which was carried out pursuant to a grand jury indictment or that they misused the legal process for an "improper, collateral objective".

"[A]buse of process finds its roots in Article 1802 of the Civil Code, Puerto Rico's general tort provision." *Abreu-Guzman v. Ford*, 69 F.Supp.2d 274, 284 (D.P.R. 1999) (citations omitted). "Puerto Rico's civil law recognizes the

doctrine of 'abuso del derecho' (abuse of law or right) as well as "uso ilegal o indebido de un procedimiento judicial' (illegal or undue use of judicial process)." Id. (citing *Boschette v. Buck*, 916 F.Supp. 91, 98 (D.P.R.1996)). However, "it has been left to the courts to determine what are the elements of such cause of action arising under Article 1802. *Id.*

The First Circuit Court of Appeals has also stated that "even assuming state law recognizes an abuse of process claim based on the initiation of a lawsuit, a party can only prevail if he proves the two elements of an abuse of process claim: ulterior motive and an act of abuse." Id. (citing *Simon v. Navon*, 71 F.3d 9,16 (1st Cir.1995)). Additionally, there are differences between the tort of malicious prosecution and abuse of process. *Simon v. Navon*, 71 F.3d 9 (1st Cir. 1995). Generally, the tort of malicious prosecution is used to challenge the whole of a lawsuit while abuse of process covers the allegedly improper use of individual legal procedures after a suit has been filed properly confused. *Boschette v. Buck*, 916 F.Supp. 91, 97 (D.P.R. 1996) *(citing Simon v. Navon*, 71 F.3d 9, 15 (1995). Moreover, "abuse of process cases typically involve misuse of such procedures as discovery, subpoenas, and attachment". *Id.*

The undersigned has thoroughly reviewed the allegations in the amended complaint. There are no allegations of ulterior motive or abuse in the instant case. The allegations are that of either negligence or gross negligence in investigating and prosecuting the underlying criminal case. There are simply no facts pled against any investigative or law

enforcement officer to support a claim for abuse of process. Indeed, the allegations in the complaint lend themselves more to a claim for malicious prosecution rather than abuse of process. The abuse of process allegations as they now stand fail to state a claim upon which relief can be granted. Therefore, it *is* RECOMMENDED that Motion to Dismiss (Docket No. 14) the abuse of process claims as alleged against investigative or law enforcement officials be GRANTED but that said claims be dismissed, without prejudice, with leave to amend if plaintiffs so desire.

3. Negligent Investigation

The United States moves to dismiss those claims raised as a result of the alleged negligent investigation[8] by the criminal prosecutors, Gil and Vega, and the FBI and IRS agents. It is the United States' position that said actions are jurisdictionally barred by the discretionary function exception, found at 28 U.S.C. § 2680(a) because criminal investigations involve policy-based discretionary decisions.

Plaintiffs reply that the discretionary function exception is not a bar to the conduct of the FBI and IRS agents as alleged in the amended complaint. With regard to Gil and Vega, plaintiffs argue that investigatory work is not necessarily related to prosecutorial tasks and is not covered by the discretional prosecutory functions, specifically when gross negligence has been alleged and proven in the underlying criminal case. More particularly, plaintiffs argue that investigation is not part of the prosecutorial function and as a result the actions of federal prosecutors Gil and Vega are not

shielded from suit by 28 U.S.C. §2680(h).

> The discretionary function exception, 28 U.S.C. § 2680(a), provides that The provisions of this chapter and section 1346(b) of this title shall not apply to—Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a).

Its purpose is to permit government employees to carry out their jobs without having to constantly second guess themselves in fear effacing lawsuits. See *United States v. S.A. Empresa de ViacaoAerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808-14 (1984). When a claim is covered by the discretionary function exception, it must be dismissed for lack of subject matter jurisdiction. 28U.S.C.§ 1346(b); *Kelly v. UnitedStates*, 924 F.2d 355 (1st Cir. 1991).

A two-part test is used to determine whether the challenged

conduct falls within the discretionary function exception. *Kelly*, 924 F.2d at 360. First, it must be determined whether the conduct itself is discretionary; and, second it must be determined whether the conduct is justified by legitimate governmental policy. *See Shansky v. United States*, 164 F.3d 688, 691 (1st Cir. 1999); *Irving v. United States*, 162 F.3d 154, 163 (1st Cir. 1998).

In determining whether the conduct is discretionary, it must be determined whether the governmental employee's duties require him or her to make independent decisions. See e.g., *Kelly v. United States*, 924 F.2d 355,360 (1st Cir. 1991); *K. W. Thompson Tool Co. v. United States*, 836 F.2d 721 (1st Cir. 1988). Of note, is that the discretionary function exception does not apply if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" or if "the acts complained of do not involve the permissible exercise of policy discretion." *Ayer v. United States*, 902F.2d 1038,1042 n. 1 (1st Cir. 1990). As to the second factor, it must be determined whether "some plausible policy justification could have undergirded the challenged conduct." *Shansky*, 164 F.3d at 692. "Investigations by federal law enforcement officers... clearly require investigative officers to consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation." *Sabow v. United States*, 93 F.3d 1445, 1453 (9th Cir. 1996).

The undersigned turns first to the actions of the IRS and FBI agents in their investigation of plaintiffs. The Amended Complaint alleges that IRS and FBI agents engaged in tortuous and negligent acts while engaged in investigative

and law enforcement activities in executing a search, seizing evidence, and making an arrest. More particularly, plaintiffs allege that facts in the indictment were incomplete, insufficient and plainly incorrect due primarily to the negligent handling of the case file and appeal papers by IRS and FBI agents who were grossly negligent in their performance and duties as investigative and law enforcement officers. "Although law enforcement agents have a mandatory duty to enforce the law, decisions as to how best to fulfill that duty are protected by the discretionary function exception to the FTCA. *Horta v. Sullivan*, 4 F.3d 2, 21 (1st Cir. 1993). Moreover, "[s]ince decisions to investigate, or not, are at the core of law enforcement activity," said conduct is the type of "policy-rooted decision making that section 2680(a) was designed to safeguard." *Kelly v. United States*, 924 F.2d 355,362 (1st Cir. 1991). Of import is that even allegations that investigators intimidated and coerced witnesses will not alter the outcome of a target's FTCA claim. *Moore v. Falder*, 65F.3d 189, 196-97 (D.C Cir. 1995).

Quite clearly, with regard to the investigatory actions of the IRS and FBI agents, the First Circuit has determined that the decision to investigate and/or prosecute an individual falls squarely within the discretionary function exception found at 28U.S.C. § 2680(a). See *Barbioni v. United States*, No. 97-1983, 1997 WL 758737 (1st Cir. 1997). As a result, there is no subject matter for those claims raising negligent investigation by IRS and FBI agents.

The exception applies equally to the actions or

inactions of prosecutors Gil and Vega, despite Court orders indicating that Gil's actions constituted "gross negligence." As with the IRS and FBI agents, plaintiffs allege that facts in the indictment were incomplete, insufficient and plainly incorrect due to the gross negligence of Gil and Vega in the investigation and handling of the criminal case. Plaintiffs point to the June 25 and July 9, 1999, orders which discuss in detail the actions of Gil during the prosecution of the criminal case. "Decisions concerning when, whether and whom to prosecute have traditionally been considered discretionary and have been held to fall within the discretionary function exception of 28 U.S.C. § 2680(a)." *K. W. Thompson Tool Co., Inc., v. United States*, 836 F.2d 721, 729 (1st Cir. 1988) (citations omitted). "All the components of the final determination - whether, when whom and how - reflect the decisions-maker's judgment of how best to enforce compliance and to deter misconduct in others." *Id.* Gil and/or Vega's actions or inactions of investigation are appropriately viewed as the "how" end of their decision in preparing and trying the criminal case.

Of note is that Courts have found that discretionary function exception applies "even though government agents acted with 'poor judgment and a general disregard for sound investigative procedure'". *Sabow v. United States*, 93 F.3d 1445, 1454 (9th Cir. 1996). The prosecutors' actions in the underlying case certainly gives one pause. It is generally expected that attorneys to read their case files and be aware of the evidence in a case. Indeed, the presiding judge ordered the Clerk of the

Court to notify the Office of Professional Responsibility and the Department of Justice of the June 25, 1999 and July 9, 1999 order. Regardless, "Congress did not intend to provide judicial review of the quality of investigative efforts." *Pooler v. United States,* 787F.2d868,871 (3d Cir. 1986). In light of the foregoing subject matter jurisdiction simply does not lie for the actions of U.S. Attorney Gil and Assistant U.S. Attorney Vega as a result of their alleged negligent investigation of the underlying criminal matter.

The actions of the FBI and IRS agents as well as those of U.S. Attorney Gil and Assistant U.S. Attorney Vega were discretionary and justified by legitimate policy considerations. Therefore, the undersigned finds that the allegations of negligent investigation against the United States fall within the discretionary function exception of the FTCA and are barred for lack of subject matter jurisdiction. Accordingly, it is RECOMMENDED that the Motion to Dismiss (Docket No. 14) be GRANTED for those claims brought pursuant to the FTCA for negligent investigation.

IV. MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs move for partial summary judgment against the United States[9] based upon the actions of U.S. Attorney Gil (Docket No. 29). Plaintiffs assert that the United States is barred by collateral estoppel from contesting liability based upon orders entered by the presiding and trial judge in the underlying criminal matter. See Criminal No. 96-104(CCC).

More particularly, plaintiffs state that whether Gil was negligent in the discharge of his duties is a question not subject to collateral attack in these proceedings (Docket No. 29)

The United States responds that plaintiffs have failed to set forth material undisputed facts establishing the specific elements of their tort claims which are grounded on false arrest and malicious prosecution. Additionally, the United States asserts that plaintiffs have not shown they are entitled to judgment as a matter of law as jurisdictional issues are implicated pursuant to the FTCA as well as other legal issues under Puerto Rico law (Docket No. 30).

A. Standard

Summary judgment is granted when, based upon the pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact, and [where] the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *Gaskell v. Harvard Coop. Soc'y*, 3 F.3d 495, 497 (1st Cir. 1993). A dispute of fact is only genuine if there is sufficient evidence to permit a reasonable jury to resolve the point in the nonmoving party's favor. *NASCO, Inc. v. Public Storage, Inc.*, 29 F.3d 28,32 (1st Cir.1994). While all reasonable inferences must be indulged in favor of the non-moving party, *Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 105 (1st Cir. 1988), a fact is considered material only when it has the "potential to affect the outcome of the suit under applicable law." *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir.1993).

B. Federal Tort Claims Act

Plaintiffs seek partial summary judgment for their claim brought pursuant to the FTCA. As discussed herein above, this court lacks subject matter jurisdiction for the claims brought pursuant to the actions taken by U.S. Attorney Gil in the underlying criminal matter. First, as discussed previously in section III.B.2.a., the conduct of a federal prosecutor such as Gil may not serve as a basis for malicious prosecution, false arrest and abuse of process claims against the United States. 28 U.S.C. § 2680(h). Second, the conduct of Gil, alleged as negligent investigation and discussed in III.B.3 above, falls within the discretionary function exception of the FTCA. 28 U.S.C. § 2680(a). As such all claims against the United States based upon the action or inaction of Gil are barred for lack of subject matter jurisdiction.

Therefore, it is RECOMMENDED, that the Plaintiffs' Motion for Summary Judgment be DENIED (Docket No. 29).

V. CONCLUSION

Based on the foregoing analysis, it is therefore RECOMMENDED as follows:

- That the United States Motion to Dismiss be GRANTED in part and DENIED in part (Docket No. 14) as follows:
- That the Motion to Dismiss be GRANTED for lack of subject matter jurisdiction as to allegations raised against Gil and Vega for false arrest, malicious prosecution and abuse of process (Section III.B.2.a).

- that the Motion to Dismiss be DENIED as to the allegations of the actions of the investigative and law enforcement officers for false arrest and malicious prosecution (Section IILB.2).
- that the Motion to Dismiss be GRANTED as to the abuse of process claims as alleged against investigative or law enforcement officials BUT that said claims be dismissed without prejudice, with leave to amend if plaintiffs so desire (Section III.B.2.b).
- that the Motion to Dismiss be GRANTED (as to prosecutors and law enforcement agents) as to the negligent investigation claims (Section III.B.3).
- That plaintiffs' Motion for Partial Summary Judgment be DENIED (Docket No. 29) (Section IV).
- That defendants' Motion for Substitution (Docket No. 36) be GRANTED and that all Puerto Rico common law claims be dismissed with prejudice against the individually named defendants (Section II).

Should this Report and Recommendation be adopted, the following will remain as viable claims: 1) the false arrest and malicious prosecution allegations brought pursuant to the Federal Tort Claims Act against the United States, for the actions of FBI and IRS agents; and 2) the *Bivens* claim for violations of

plaintiffs' federal constitutional rights against U.S. Attorney Gil, Assistant U.S. Attorney Vega and FBI Agent Johnson. Additionally, should this report and recommendation be adopted, if plaintiffs so desire, they may amend their complaint with regard to the allegations of abuse of process against the United States for the actions of FBI and IRS agents.

This Report and Recommendation is filed pursuant to 28 U.S.C. § 636(b)(l)(B) and Rule 1 1 : Change of Plea 504.3 of the Local Rules of Court. Any objections to the same must be specific and must be filed with the Clerk of Court within ten (10) days of notice. Rule 11: Change of Plea 510.1, Local Rules of Court; Fed. R. Civ. P. 72 (b). Failure to timely file specific objections to the Report and Recommendation waives the right to review by the District Court, and waives the right to appeal the District Court's order. *United States v. Valencia-Copete,* 792F.2d4, 6 (IstCir. 1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616F.2d603 (1st Cir. 1980). The parties are advised that review of a Magistrate-Judge's Report and Recommendation by a District Judge does not necessarily confer entitlement as of right to a de *novo* hearing and does not permit consideration of issues not raised before the Magistrate-Judge. *Pater son-Leitch v. Massachusetts* EJec.,840F.2d985 (1st Cir. 1988).

Copy of the Report and Recommendation is to be served upon the parties by facsimile on this same date.

SO RECOMMENDED.

At San Juan, Puerto Rico, on this 10th day of September, 2001.

[Signed by]

[1]The United States does not seek to dismiss the *Bivens* claim.

[2]The Amended Complaint contains two "Third" causes of action. The first "Third" cause of action is brought by Mrs. Cartagena against the United States and the second "Third" cause of action is brought by Mr. Mojica against the United States. both pursuant to the FTCA.

[3]Torres is not a party to this lawsuit.

[4]The indictment alleged a conspiracy spanning from August 1984 through December 1995inPuerto Rico and Florida that Nogueras. Mojica and Jose M. Torres-Dueño willfully conspired to defraud the United States of America and the Internal Revenue Service in the evaluation and collection of taxes. interests and penalties totaling $2.239.893.50 that was allegedly owed by Nogueras.

[5]McKeever is not a named defendant.

[6]The Attorney General delegated certification authority under 28 U.S.C. § 2679(d) (1) to United States Attorneys. 28 C.F.R. § 15.3(a).

[7]Upon careful reading of plaintiffs' oppositions to the motion to dismiss it appears that plaintiffs are intermingling arguments regarding violations of constitutional rights with arguments regarding claims brought pursuant to the FTCA. As previously indicated, the United States seeks only to dismiss those claims brought pursuant to the FTCA. The United States has not moved to dismiss the *Bivens'* claims alleging violations of constitutional rights.

[8]The First Circuit has declined to speculate whether the Puerto Rico Supreme Court would be receptive to a claim for negligent investigation. *Rodriguez v. United States,* 54 F.3d 41, 47 (1st Cir. 1995). Regardless. the undersigned addresses the claim as alleged by the plaintiffs.

[9] Plaintiffs actually seek summary judgment against Gil and the

United States. The undersigned recommended in "Section II" that Gil be substituted by the United States for those claims brought against him pursuant to the FTCA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NICOLAS NOGUERAS CARTAGENA, et al., **CIVIL NO. 00-1778 (DRD)**
Plaintiffs

v.

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U.S. DISTRICT COURT
SAN JUAN, PR

UNITED STATES OF AMERICA, et al.,
Defendants.

ORDER

On September 18, 2002, after a request from the undersigned, Magistrate issued a Report and Recommendation in this case, specifically addressing Docket # 87, 97, 99, 110 and 111. The ultimate recommendation of Magistrate Arenas was that Defendants' Motion to Dismiss be granted, and this case dismissed.

The Court has *sua sponte* throughly reviewed all documents submitted to the Court which regard these Motions to Dismiss. The Court considers Magistrate Arenas' Report and Recommendation to be well reasoned, and his ultimate conclusion legally sound. A summary of this case is warranted. Two basic underlying causes of action stem from a 1 996 indictment filed by then Acting U.S. Attorney for the District of Puerto Rico against the Plaintiffs. These two causes of action include a *Bivens* claim for violation of the Plaintiffs' federal constitutional rights *(see; Bivens* v. *Six Unknown Fed. Narcotics Agents.* 403 U.S. 388, 91 S.Ct. 1999, 29 L. Ed. 2d 619 (1971), and a Federal Tort Claims Act for false arrest and

malicious prosecution (see: 28 U.S.C. § 1346).

Concerning the *Bivens* claim, in Magistrate Arenas' well-reasoned R&R, he recommended that the Court must first determine whether an actual deprivation of constitutional rights occurred. The ultimate question then becomes whether an objectively reasonable officer would have understood that his or her conduct violated a clearly established constitutional right. *See: Abreu Guzman v. Ford*, 241 F.3d 69, 73 (1st Cir. 2001). It is clear that the Fourth Amendment requires arrests be made based on probable cause. When an arrest is made subject to a warrant, then even if probable cause may be lacking, an arresting officer is entitled to qualified immunity unless the warrant is so lacking in probable cause that official belief in its existence would be unreasonable. *See: Id.* A Grand Jury returned an indictment in this case, finding probable cause against Co-Plaintiff Nogueras. Though Magistrate Arenas reported Plaintiffs have not contested the facts upon which the indictment was issued . even if Plaintiffs' allegations were considered as true, the fact still remains that the Grand Jury Ld find probable cause to arrest, and a reasonable officer could thus believe probable cause existed for the arrest, Accordingly, qualified immunity shields the Defendants from the *Bivens* claim.

Concerning the Federal Tort Claims Act, the Act itself holds that state law of the state whereas
the alleged damages took place controls. *See: Rodriguez v. United States*, 54 F.3d 4], 44 (1st Cir. 1995). Under Puerto *Rico* law, the key issue is whether an arresting officer lacked reasonable cause for believing a suspect had committed a felony. *See: Abreu Cuzman, supra*, at 75. Again, as noted above, with a Grand Jury indictment sufficient probable cause existed to make the arrest. The crux of Plaintiffs' position on this point concerns an allegedly inappropriate social relationship between an arresting FBI agent and a member of the Grand Jury. Two Grand Juries investigated the actions of Co-Plaintiff Nogueras, however. Grand Jury #1 was the Grand Jury where the Grand Juror who allegedly had social contact: with the FBI agent sat. It was Grand Jury #2, however, that returned the indictment. Grand Jury #1 had nothing to do with these arrests. With probable cause, under Puerto Rico law the

arresting officers are shielded from causes of action as to false arrest, false imprisonment, and / or malicious prosecution, and thus Magistrate Arenas recommended the Federal Tort Claims Act cause of action be dismissed as well. *See:* Harrington v. United States, 748 F.Supp. 919, 933 (D.P.R. 1990) (citing line of Puerto Rico caselaw on point).

Plaintiffs have been given a specific term often (10) days to file objections to the R&R, if any. If Plaintiffs ultimately timely submit objections, they may only object to the specific findings of Magistrate Arenas, and this Court may only review what Plaintiffs specifically object to. Accordingly, again, after thoroughly reviewing the R&R and all supporting documents, the Court finds the R&R to be legally sound, and hereby adopts the recommendation in its entirety.

Should Plaintiffs subsequently file timely objections to the R&R. they will be considered a Motion for Reconsideration by the Court. Thus, the Court will be in a position to review the subject matter dockets as a whole, in the interests of justice. The Court will stay issuing a judgment dismissing this case pending receipt of the objections, if any. The Court, however **adopts the recommendation in its** entirety. Plaintiffs are cautioned, however, that they are not authorized to raise ***any*** *new arguments whatsoever*, only those arguments brought up in their original Oppositions to the Motions to Dismiss may continue to be addressed. Davet v. Maccarone, 973 F.2d 22, 30-31 (1st Cir. 1992). *See* Keating v. Secretary of H.H.S., 848 F.2d 271. 275 (1st Cir. 1988); Borden v. Secretary of H.H.S., 836 F.2d 4, *6* (1987) ("[appellant was entitled to a *de nova* review by the District Court of the recommendations to which he objected,..., however he was not entitled to a *de novo* review of an argument never raised."); United States v. Valencia, 792 F.2d4,6 (1st Cir. 1986); Park Motor Mart, inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

DATE: September 26, 2002

[signed DANIEL R. DOMINGUEZ]
DANIEL R. DOMINGUEZ
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NICOLÁS NOGUERAS CARTAGENA, ABIGAIL MOJICA ESCOBAR, NICOLLE NOGUERAS-MOJICA, BERTA CARTAGENA AND DANIEL MOJICA **Plaintiffs** **vs.** **UNITED STATES OF AMERICA,, GUILLERMO GIL-BONAR, JORGE VEGA-PACHECO, and JOHN JOHNSON** **Defendants**	**CIVIL NO. 00-1778 (DRD)**

OBJECTION TO MAGISTRATE'S REPORT AND RECCOMENDATION OR RESPONSE TO ORDER

TO THE HONORABLE COURT:

COME NOW, plaintiffs through their undersigned

counsel and very respectfully PRAYS and AVERS:

1. On September 10, 2001, Magistrate Judge, Aida M,. Delgado-Colón issued a Report and Recommendation (hereinafter referred to as R&R) wherein which it granted with prejudice co-defendants', Gil and Vega's Motion to Dismiss for lack of subject matter jurisdiction as to allegations raised against said co-defendants', for false arrest, malicious prosecution and abuse of process; defendants' motion for substitution against all defendants for all Puerto Rico common law claims; as to co-defendant prosecutors and law enforcement agents regarding the negligent investigation claims. The R&R also granted without prejudice the abuse of process claims filed against the investigative or law enforcement agents. However, the R&R denied the motion to dismiss as to the actions of the investigative and law enforcement officers for false arrest and malicious prosecution. Finally, the Magistrate Judge dismisses plaintiffs' Motion for Partial Summary Judgment.

2. The R&R continues to state that pursuant to said report that if the R&R was adopted by the Court the following claims would subsist and remain as viable claims:

a) The false arrest and malicious prosecution allegations brought pursuant to the Federal Tort Claims Act (FTCA), for the actions of FBI and IRS agents.

b) The *Bivens* claim for violation of plaintiffs' federal constitutional rights against U.S. Attorney Gil, Assistant U.S. Attorney and FBI agent John Johnson.

c) If plaintiffs amend their complaint with regard to the allegations of abuse of process against the U.S. and FBI agents.

3. On September 19, 2001, co-defendant U.S. filed a motion for reconsideration of said R&R and/or renewed motion to dismiss. In its original motion to dismiss defendants moved to dismiss claims raised pursuant to the FTCA base on the following:

a) Claims based upon the prosecutors' conduct are barred because they fall outside the U.S.'s limited waiver of sovereign immunity under the FTCA.

b) The negligent investigation claims are jurisdictionally barred by the discretionary function exception to the FTCA; and

c) The false arrest , malicious prosecution and abuse of process claims fail to state a cause of action under the Pueto Rico law.

4. Thus, defendants' renewed motion to dismiss is purportedly a rehashing of its previous motion to dismiss although it does not "renew" its dismissal prayer as to points b) & c) of paragraph 2. It is only after plaintiffs' amended complaint that point c) is referred to by defendants. As a matter of fact Magistrate Judge Delgado notes in the R&R in its first footnote that "the United States does not seek to dismiss the *Bivens* claim."

5. In its amended complaint plaintiffs include pursuant to the FTCA, averments of *inter alia*, governmental misconduct of its agents and representatives due to claims of

false arrest, malicious prosecution, abuse of process, negligent investigation and infliction of emotional distress resulting from defendants tortious actions. Plaintiffs also include a *Bivens* claim under the holding of Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 US 388 (1971), which provides for relief for individuals against government agents acting under color of lawful authority. Finally, plaintiffs state a claim for the deprivation of their constitutional right to due process and equal protection of the law, the right to be free from unreasonable searches and seizures, and the pursuit of liberty, property and freedom of speach and association. As stated hereinabove Magistrate Judge Delgado's R&R stated which of these claims remained viable if her R&R were to be adopted.[1]

6. On September 10, 2001, Magistrate Judge, Aida M,. Delgado-Colón issued a Report and Recommendation (hereinafter referred to as R&R) wherein which it granted with prejudice co-defendants', Gil and Vega's Motion to Dismiss for lack of subject matter jurisdiction as to allegations raised against said co-defendants', for false arrest, malicious prosecution and abuse of process; defendants' motion for substitution against all defendants for all Puerto Rico common law claims; as to co-defendant prosecutors and law enforcement agents regarding the negligent investigation claims. The R&R also granted without prejudice the abuse of

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1. See paragraph 2. of page 2 above.

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b) The negligent investigation claims are jurisdictionally barred by the discretionary function exception

to the FTCA: and

c) The false arrest , malicious prosecution and abuse of process claims fail to state a cause of action under the Pueto Rico law.

Additionally plaintiff has alleged, and the district judge in charge of the criminal proceedings has held, that during the course of the criminal proceedings exculpatory evidence, which was not shown to the grand jury, was in fact destroyed by the government agents, including co-defendant. Redress is sought from such a violation of constitutional rights.

7. During the criminal case trial IRS agent Ronald McKeever provided false statements and representations and presented incomplete, insufficient, incorrect and false facts. In addition, government agents admitted that many important records necessary for co-plaintiff, Noguera's defense had been destroyed. Then U.S. Attorney, and co-defendant herein requested dismissal of all charges, with prejudice, prior to the time the third government witness was to be called to testify. The criminal trial court concluded that the alleged facts in the indictment were incomplete, insufficient and plainly incorrect due to the negligent handling of the case by IRS and FBI agents. The court additionally states that these agents were grossly negligent iin their performance and duties as investigative and law enforcement officers as were co-defendants Gil & Vega in their investigation and handling of the case. All criminal charges were forthwithly dismissed. In its order of dismissal of all indictments the trial court stated

that it "GRANTS the Request for Dismissal of the indictment, with prejudice... and hereby terminates a prosecution which should never have been initiated." Based on these initial facts plaintiffs file the instant complaint.

8. On September 28, 2001 this Court entered an Opinion and Order which succintly adopts the Magistrate Judge's R&R in its entirety. On November 20, 2001 the United States once again renews its motion to dismiss.

9. Motions to Dismiss fall in the aegis of Federal Rule of Civil Procedure 12(b). Rule 12(b) (6) provides defendant's with relief for claims as a defense for failure to state a claim upon which relief can be granted.

10. The primary purpose of the pleadings is to give the Court and the opposing party a fair notice of the pleader's contention so as to give him a fair chance for defense. Conley v. Gibson, 355 US 41 (1957); in order to consider a Motion to Dismiss under Rule 12(b)(6) of Federal Civil Procedure all factual allegations in the Complaint must be taken as true and construed favorably to plaintiff. Labounty v. Addler, 933 F2d 121.

Furthermore, it must appear, beyond doubt, that plaintiffs cannot prove any set of facts in support of their claim which would entitle them to relief. Conley, supra, Brown v. Crawford County, 920 F2d 1002; Carreiro v. Rhoder Still & Co. LTD., 68 F30 1443, Garrett v. Commonwealth Mtg. Co., 938 F2d 591.

11. A Motion to Dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Walsh v. McGee, 918 F Supp. 107. Plaintiffs must be given the benefit of all favorable inferences to be drawn from the factual allegations. New Some v. County of Santa Fe, 922 F Supp. 519. Prospt v. Bitzer, 39 F3d

148. The minimum requirement in a pleading such as a Complaint is to outline a violation and allege facts that fairly notify the defendant of plaintiffs claims that he is connected with such violation. Brownlee v. Conine, 957 F2d 353. However evidentiary and extremely detailed pleadings are not favored, Simmons v. Abruzzo, 49 F3d 83; and may be subject to dismissal Vicom Inc. v. Harebridge Merchant Serv. Inc., 20 f 3d 71. Thus a claim is not inadequate because an element of the claim is omitted, so long as the element may be fairly inferred from the pleading as a whole. Walter v. South Bell Tel. Co. 904 f 2d 275. "When a Federal Court reviews the sufficiency of a complaint, "(t)he issue is not whether the claimant is entitled to offer evidence to support the claims. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. " Schever . Rhodis 416 US 232.

12. As a matter of fact the own Federal Rules of Civil Procedure, Rule 8(a) states that:

> A pleading which sets forth a claim for relief... shall contain
>
> (2) a **short** and **plain** statement of the claim showing that
>
> the pleader is entitled to relief, and a demand for judgment
>
> for the relief the pleader seeks. [Emphasis Supplied].

The only requirement is that a peading contain enough information to fairly notify the opposing party of the basis of the claim. It does not require an elaborate narration of facts, nor does it require that a legal theory of recovery or relief be

set forth. The standard drafting technique is to state enough facts to identify the events or transactions that your claim is based on and the legal theory of recovery.[2] (See Conley v. Gibson, 355 US 41 (1957)). The only exception to that simple notice pleading requirement is Rule 9, which requires that cetain matters, including capacity and authority to sue, fraud, mistake, and special damages, be alleged specifically and particularly. Furthermore, the court must give the complaint a highly deferential reading, accepting the facts thereins stated as true and affording all reasonable inferences in plaintiffs' favor. H.J. Inc. v. Northwestern Bell Tel. Co., 492 US 229 (1989). Barrington Cove Ltd. v. Rhode Island House & Mortgage Fin. Corp., 246 F. 3d 1 (1st. Cir. 2001); Aulson v. Blanchard, 83 F. 3d 1 (1st. Cir. 1996).

13. On September 18, 2002 Magistrate Judge, Justo Arenas, filed his R&R which recommended that this renewed motion to dismiss be granted as to all defendants. After being granted an extension of time to file our objections to this R&R we hereby proceed.

14. Defendants allege in its motion to dismiss that the three claims that still subsist and identified as such by Magistrate Judge Delgado-Colón's R&R are that:

a) IRS and FBI agents and the US Attorneys appeared before two grand juries and submitted false and erroneous information which produced the indictment;

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2. Wright §68; James & Hazard §3.8; Friedenthal §5.7; Moore's Manual §901;Wright & Miller §§1182-1192; Moore's Federal ractice §§8.02-8.06.

b) The wife of an FBI agent was on the first grand jury regarding a monetary transfer which he knew to be false;

c) That the FBI agent provided information to the grand jury regarding a monetary transfer which he knew to be false;

15. They contend that these are mere conclusory allegations, and that no facts have been pled, that if true; would negate probable cause for the arrest and prosecution and thus are insufficient to preclude dismissal. To confront such burden defendant US alleges that plaintiffs must allege facts that negate the conclusion that the indictment was issued pursuant to probable cause because:

a) Nogueras owed the IRS tax assessments;

b) Nogueras avoided paying the assessments;

c) Hired Torres to represent him before the IRS on a tax case in which Torres personally supervised while serving as IRS Branch Chief;

d) Nogueras structured a bank transaction to avoid annual financial transaction reporting requirements.

16. The United States alleges that since upon this information, however untrue, the Grand Jury returned the indictment, there is no ground to avoid dismissal. Furthermore, defendants address the specific allegations that have been made thus far and which were identified by the Magsitrate Court when denying the dismissal of the cause of action.

a) From their own documents it appears that the basic foundation on which the investigation was initiated was information from the office of the Comptroller of Puerto Rico. One of the referrals consisted of two audits by the comptroller in

which it found that Mr. Nogueras had used his personal computer in his office at the Senate; and a payment of $200,000.00 effected to the Senator from the liquidations office of the corporation for Urban Renewal and Housing; (CRUV in Spanish).

b) From this computer John Johnson alleged having pulled out documents pertinent to the violations of federal law. This documents consisted of a transferral of 26 million dollars and a $175,000.00 transfer to a John in March of 1990. Tab B pages 10-11 of docket #87. Testimony of John Johnson of August 24, 1994.

17. The Honorable Judge Consuelo Cerezo was not convinced that the Grand Jury proceeding that were conducted a year before in Grand Jury 94-2 had any bearing on Grand Jury 95-1 in which indicted the defendants. Maritza Lebrón had participated in 1994 in the first Grand Jury proceeding, but not in the 1995 Grand Jury. The Court denied a Motion to Dismiss the indictment under the Court's Supervisory Power due to Government's Misconduct before the Grand Jury filed by defendant Nicolás Nogueras Cartagena on May 12, 1999. See Tab A, docket #87.

18. The reason for this discussion was that defendant Nogueras alleged that sentimental ties between Agent Johnson and Grand Jury member Lebrón, existed and affected the Grand Jury's voting. In several interviews made by Nogueras with Miss Lebrón, she provided information that the members of said grand jury were the following persons: John Arzuaga, Las Piedras, Olga Matos, Mildred Nigaglioni, Fernando Pérez, Luis González, Maritza Lebrón (high level political activist, PPD), Ing. Eduardo Martínez (Lajas) Madeline Nigagliotty, Cabo Rojo (Lifescan), Angel A. Ofret, Pedro Vázquez, (NPP political activist), Bayamón,

Manuel Feliciano, José A. Aldarondo, Mary I. del Valle, Ada I. Rivera, Sabrina Maysonet, Nélida Mojica, (Municipal Housing Director of the Municipality of Caguas, and high level political activist of the PPD), Emma Torres (Bayamón Family) the Foreman, Juan O. Rodríguez, Division Director of HUD, and Edwin Ramos Yordán (political activist of the New Progressive Party). At that point in time, Miss. Maritza Lebrón was living together, with agent Johnson and his mother, which she did for three years. She was a political activist that had worked with Governor Rafael Hernández Colón, Senator Miguel Hernández Agosto, the now mayor of Caguas, William Miranda Marín, and other important leaders of the Popular democratic Party. Together with her, in said grand jury were another activists of her political party and two of the New Progressive Party. At the time she was chosen as a member of said grand jury panel, one of two existent panels, she questioned Agent Johnson about the impropriety of her being in that panel, and that after consulting with the US attorney's office and with an AUSA, both Agent Johnson and the US attorney's told her that there was nothing wrong with her presence in that particular panel that was going to investigate Nogueras and that she could stay. Instead of choosing the other panel convened, for conducting the investigation relative to me, the panel chosen by the USDA was the one where she was together with the other political activists. Agent Johnson testified before said grand jury, at which time, as a matter of self respect, she got up and left, to later came back. When she returned, the other members of the grand jury commented about Agent Johnson's statement in regard to alleged findings of the then Comptroller of Puerto Rico, Ileana Colón Carlo, when she seized and searched a Computer in Nogueras' Senate of Puerto Rico Office, that had been assigned to

Nogueras after having been previously assigned to then Senator Carlos Romero Barceló. Said jurors talked with Miss. Lebrón, about money transfers allegedly made by Nogueras, of $26, million dollars, and other matters that were presented as the excuse to obtain authorization to further investigate Nogueras. One of the issues involving Nogueras, was related to the settlement of a law suit that was filed against the trustee in charge of liquidating the assets of CRUV, on behalf of the then residents of Villa Panamericana involving, therefore, public housing. Said case had stirred a fight between the then trustee, Cabrero, Marcos Morell, NPP Secretary and one of Cabrero's attorney, and Comptroller, Ileana Colón Carlo, who had had a personal clash with Nogueras, then a member of the Senate, in regard to a computer assigned to his office, previously assigned to then Senator, Carlos Romero Barceló. This is precisely the same transaction that was identified before the second Grand Jury which was in turn the one that indicted Nogueras. However, the United States insists that the two Grand Juries where in fact separate.

19. At the time the Grand Jury convened, Nogueras had also clashed with NPP government, in regard to the teacher's strike and Secretary of Education José Arsenio Torres, the appointment of attorney Enid Moya as Secretary of Justice, the proposed privatization of the State Insurance Fund, ACAA, AAA, Sugar Corporation, the Navieras Sale, the public sector collective bargaining bill, and legislation proposed by the PR Manufacturing Association and the PR Hotel Association, to amend, repeal and approve certain labor laws. Nogueras presided the Senate Labor Committee and also was Senate Vice President. The then Secretary of the Treasury, Manuel Díaz Saldaña, was President of the Governor's Committee on Privatization. He had expressed his

hostility to Nogueras because of his stand on said issues. So, at the time in March, 1994 in which the grand jury convened, Nogueras did not enjoy the sympathy of either the PPD or NPP's political activists.

20. Living at Agent Johnson's house with him and his mother, the above referred to lady, was chosen for the Grand Jury that would authorize the investigation against Nogueras, and the issuance of subpoenas. Miss. Lebrón also voted for the issuance of subpoenas, and interacted with the other members of the grand jury, in such a way that they developed close ties and knew her relationships with agent Johnson, who picked her up at lunch time, in their presence.

21. Both Agent Johnson and the United States Attorney knew that by that time the Puerto Rico Secretary of Justice had fully investigated that matter, and that the million dollars transaction that appeared in the computer had nothing to do with Nogueras. They reflected transactions of an entity know as TORAMA, which had to do in a political campaign with the financing of the PPD campaign, which the former user of the Computer, Carlos Romero Barceló had obtained, and was put there by his press aide Pedro Figueroa (who is now NPP majority leader at the House of Representatives) who also was later employed by me. All of the above is true, to the best of Nogueras' collection and belief as information obtained from Maritza Lebrón.

22. By his own knowledge Nogueras' has stated before this court that:

United States Attorney Gil tried in 1996 to gather support for his nomination by the President of the United States to an ordinary tenure of his office. Such situation came to Nogueras' knowledge through his relationships to the New Progressive Party and by press

releases.

23. With the advent of such political party to the administrative control of the Commonwealth of Puerto Rico in 1993, there were political contacts and influence on behalf of the Commonwealth, both in Congress and the White House and in the Republican and Democratic Party. Come 1996, an election year, and with the possibility of the New Progressive Party's winning again administrative control over the Commonwealth of Puerto Rico, a second chance at his official appointment to office appeared, for AUSA Gil. At the same time, due to Nogueras' opposition to important governmental issues, such as privatization, conservative changes in labor legislation, the sale of the "Navieras" by the government and corrupt government officials' practices, they utilized their governmental power to foster false accusations, and file criminal charges against me, so that I would be expelled from the Senate and could not run for another term in the Senate of Puerto Rico. For these the New Progressive Party and Government leaders used their state and federal influence, including their control of the representation of the principal national parties. Among these members and directives was Carlos Romero Barceló, who was at the time the principal advocate and friend for Attorney Guillermo Gil, in Washington DC. The plan, engineered by said government officials, included the Governor Pedro Roselló, the Puerto Rico Resident Commissioner in Washington, Carlos Romero Barceló, the Secretary of the Party, Marcos Morell, a close friend, assistant, personal and political representative in Puerto Rico and Washington of the Governor, and Chief of Staff Alvaro Cifuentes, the heads of local newspaper "El Vocero", a close friend for many years, of AUSA Guillermo Gil, FBI Agent John Johnson and his close personal friend, Comptroller

Ileana Colón Carlo, and the PR Secretary of the Treasury Manuel F. Saldaña, also head of the Privatization Committee of the Government and key NPR legislators in the Senate and the House. Some of those persons had been accused by Nogueras of corrupt practices in government.

Because of Nogueras position as Vice-President of the Senate and Chairman of the Senate Committee on Labor, Human Resources and Veteran Affairs, and his public dissenting expressions in the abovementioned governmental matters, Nogueras became a political dissident of his own party.

24. Assistant U.S. Attorney (AUSA) Guillermo Gil met with some of the above persons and coordinated his efforts with them, against Nogueras. AUSA Guillermo Gil in conspiracy with FBI agent John Johnson allowed to have in one of the Grand Jury investigations convened against Nogueras, to sit in said panel a consensual wife of said agent and discuss with him matters of the investigation, while said Agent also went out with Comptroller Ileana Colón Carlo to shows, hotels and restaurants in their friendly personal relations, and also went out on a personal basis with AUSA Gil. AUSA Gil timed the Grand Jury meetings and the return of the Indictment against Nogueras and his wife, so that they would be arrested with full scale publicity, the day before the Senate meeting for his prearranged political expulsion from the Senate.

25. AUSA Gil advised press members to go near Nogueras home to wait for the agents that were to arrest him, canceled the testimony of witnesses he had summoned to the Grand Jury, so that his timing of the arrests would not be affected and arranged for a press conference with Comptroller Colón Carlo and the FBI, at the time of Nogueras arrest, while a display of force of numerous FBI

agents, state and municipal police, with machine guns, rifles and guns came out of vans and cars surrounding the car Nogueras was in, close to his home, without having yet an arrest warrant, which came close to an hour later, after taking Nogueras back to his home to wait for agent Johnson to come with said warrant.

26. With an indictment on federal charges, they were helping to justify publicly and with some undecided senate members, Nogueras' expulsion from the senatorial body, the next day. The federal charges brought against Nogueras and the orchestrated publicity, were a key factor in his expulsion from the senatorial body which occurred one day after his arrest.

27. During the course of the criminal procedures prior to filing case 96-104, Noguera's first attorney, Ignacio Rivera, communicated an offer by United States Attorney Guillermo Gil and tried to convince Nogueras that if I would plead guilty to the charges in the Indictment, he would not indict his wife, Abigail Mójica. Said attorney, (who Nogueras later learned, was a personal friend of AUSA Gil, since he was the AUSA in 1972) together, with at that time, FBI Agent Pedro Toledo, arrested Gil at Fort Buchanan, for breaking and entering with a gang, dedicated to robbing military shops. Agent Toledo, in 1996 was Superintendent of Police for the New Progressive Party Government. Attorney Ignacio Rivera, declared CIA Agent, resigned Nogueras' case after he published the second part of his book Los Honorables, where Nogueras mentioned these facts.

28. IRS never assessed or established any liability with respect to Abigail Mójica as a responsible officer, for the 100% tax penalty assessment on which the charges in Criminal Case 96-104 were based. None of the evidence gathered in said criminal case linked Abigail Mójica with any of the issues in the case, none of

the bank transactions on which the charges were based were currency transactions, nor was she present at the time they occurred and that therefore they did not amount to an intent on my part or her part of defrauding the United States of the collection of any assessed tax liability. AUSA Gil used the criminal charges against her, to pressure Nogueras into making a plea. She was arrested at her home in Orlando, Florida, also with an excessive display of force, to coerce her to testify against Nogueras.

29. During the investigation of the defense in Criminal 96-104 it was found that John Johnson declared to the First Grand Jury summoned to return an Indictment against me, that a computer which his friend Comptroller Colón Carlo seized and searched on Nogueras' Senate, office was used to encumber and transfer funds in fraud of the IRS' efforts to collect, notwithstanding the fact that Puerto Rico Comptroller Colón Carlo emitted a report indicating that the computer was not equipped to perform the transactions; plus a sworn statement from Mr. Pedro Figueroa former Romero Barceló's press aide, stating that such information was there, because he had filed the same, concerning the TORAMA Groups of the Popular Democratic Party, a transaction that he was investigating as part of his functions as Romero Barcelo's legislative assistant, Mr. Figueroa then went on to occupy a position as Electoral Commissioner for the New Progressive Party. Said AUSA and agent Johnson purposely withheld evidence from the Grand Jury, to that effect, and on the contrary, purposely led the Grand Jury to believe that the Comptroller Colón Carlo had uncovered a treasure of 26 million dollars belonging to me, which Nogueras transferred in money transactions with said computer, through different parts of the world.

1. The bearing of such matter on the case at hand is that it

> denotes defendant's intentional efforts to unjustifiedly prosecute the plaintiff in the present case. However, we fail to see how this justifies defendants United States request for dismissal in light of the recent rulings to the court.

30. The United States is requesting that this court grants a collateral estopel status to a matter already decided by the court in the criminal case. The Magistrate Judge already encountered the issue and expressed:

> "In the criminal case the issue decided by the court was whether to dismiss with prejudice the indictment. Here, the issue is whether the United States has committed the torts of false arrest, malicious prosecution, and abuse of process." Docket 83 page 14.

Such determination was accepted by all parties since no objection followed the report and recommendations. It hence has become the law of the case that no matters concerning trial determinations or resolutions in the course of the criminal case will have no collateral effect as to the matters being put before this court. The matters before this court are not wether to determine that the First or the Second Grand Jury caused the return of the Indictment, but wether the United States engaged in malicious prosecution against the plaintiff in this case. In the criminal case the issue before the court was wether the Indictment was flawed as a matter of law. However, in this case, the prosecutorial activity

of the defendant cannot be abstracted as pertaining to one or another Grand Jury. The effect of both Grand Jury was consecutive and accumulative to evidence the real intention behind the prosecutorial activity.

31. The criminal case in which this complaint is based is a lamentable sequence of events that have been skillfully concocted by co-defendants to assure that prosecution against plaintiff was effected. Plaintiffs have not expressed any objection as to the power of the United States to investigate and prosecute. What we have protested is that the United States, through its employees and investigators, lends itself to political manipulation through its power to prosecute. The prosecutorial activity should be left uncompromised to deal with matters pertinent to violations of law. However, when incriminating facts are created and exculpatory facts and circumstances are purposed excluded from the Grand Jury's attention there should be cause for concern. Furthermore, when circumstances are misconstrued to forward illegitimate motives and interests through legitimate governmental procedures, intent arises. Plaintiffs assertions as to these matters have been far from conclusory.

32. Magistrate Judge Arena's R&R states defendants' arguments as to the allegation that false and erroneous information was submitted to the grand jury "does not indicate in any way that such false testimony was given". In addition, states the R&R that defendants argue that "even if the allegations were true it would not be sufficient to negate probable cause for the arrest and prosecution of the plaintiffs". Therefore, aver defendants, plaintiffs have only proferred conclusory and unsupported allegations. Furthermore, defendants argue that plaintiffs' claims of false and malicious prosecution have failed to set forth the facts

which, if proved, would show lack of probable cause for the arrests and prosecution of plaintiffs, and that as to their abuse of process claim plaintiffs have failed to alllege any well-pled facts that the FBI and IRS agents had an ulterior motive in investigating Nogueras, or that they committed an "act of abuse". Finally, that in view of the above, defendants contend that since plaintiffs' allegations of false arrest, malicious prosecution and abuse of claim fail to state a viable claim thus, their FTCA claims should be dismissed.

33. We must underline the provisions of Rule 12(b)(6) discussed hereinabove as to the extent of the pleadings in plaintiffs' complaint. Defendants asks this court to dismiss the complaint for lack of alleging a well-pled claim. This so-called defense squarely flies in the face of the provisions of Rule 8 of the Federal Rules of Civil Procedure which as state hereinabove calls for a **short** and **plain** statements of the claim showing that the pleader is entitled to relief. What more do defendants want? That in its complaint plaintiffs not only set forth their cause of action but that in addition it supply all the evidence in support thereof? We respectfully submit that this is not the finality of the rules.

34. As to the *Bivens* claim and the qualified immunity defense the court correctly states that the ultimate question is "whether an objectively reasonalbe officer performing discretionary functions, would have understood his or her conduct violated [the] clearly established constitutional rights".

35. In Sloan v. U. S. Dept. of Housing & Urban Development, 236 F 3d 756 (D. C Cir. 2000) which dealt with the discretionary function exception of the F T C A under 28 U S C. Ser. 2680 (a) the Court cites Moore v. Valder, 65 F3d 189 (D. C. Cir, 1995) which in turn cites Buckley v. Fitzsimmons, 113 S.

Ct.2606 (1993) where the U. S. Supreme Court states that when a prosecutor performs the investigative functions normally performed by a detective or police officer, he is entitled only to the qualified immunity that the detective or police officer enjoys.

Also, the Court, states that in Buckley , supra, the prosecutor has no absolute immunity for the alleged fabrication of evidence and that he should not be considered an advocate before he has probable cause to have anyone arrested, which is one of the claims in the instant case. Furthermore, it states that the prosecutor does not have absolute immunity for making false statements to the press, because statements to the media have no functional tie to the judicial process. That is also part of the alleged facts of the instant case: prosecutor's statements to the media at the time of plaintiff's arrest as well as his "invitation" to go to plaintiff's home to cover his arrest.

Intimidating and coercing witnesses to affect their testimony is not advocatory. It is a misuse of investigative techniques acquiring evidence which might be used in a prosecution, is a police function.

36. In the Buckley case, supra, cited at Moore, supra, the Supreme Court, stated. "A prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted and tried, that work may be retrospectively described as " preparation" for a possible trial... When the functions of prosecutors and detectives are the same... the immunity that protects them is also the same... "Ibid, at 2617.

In regard to the discretionary function exception to the FTCA, Moore, supra, states that the court should examine carefully the allegations made to determine whether they are separable from

protected discretionary decisions and that if such separability exists, then the conduct of the prosecutor may be actionable under the FTCA.

It is submitted that Sloan establishes that the decision whether to prosecute, assessing a witness's credibility, identifying the evidence to submit to the grand jury and determining whether information is exculpatory and material, are actions that require his professional judgment, is discretionary, but not when prior to the start of the investigation or of his functions as an advocate in the case, the prosecutor has decided to persecute and prosecute a citizen and to achieve the goal of probable cause and arrest, his assessment of witnesses is tainted with prejudice and so is his submission of the case before a grand jury, because the initial decision to persecute and prosecute has been made at the beginning, thereby conditioning all his conduct to the conclusion already made by him at the start, abusing the legal process to foster his private agenda.

The court in Moore, supra, left undecided whether the presentation of exculpatory evidence mandatory under Department of Justice Manual, 9-11.233 (October 1, 1990) creates an enforceable right. The court there, decided that what the regulation requires under a specific set of circumstances is itself a discretionary act. Yet, the Court cited Buckley, supra, negating immunity for the fabrication of evidence.

37. Sorting out evidence, "spoliating" evidence, fabricating evidence, intentionally withholding information and other acts alleged in the Complaint in this case, against defendants, are certainly, not discretionary, under Buckley, supra, and under the facts and circumstances of this case makes the duty under that Manual, an enforceable right which did not require from

defendants a decision as to what the regulation called for, because the decision to exclude any such evidence, on the one hand, and to fabricate other evidence, on the other hand, to obtain an indictment, had been made already, before the case even started.

38. In Sloan, the facts reflected decisions involving elements of judgment and choice and involved considerations of public policy. In the instant case, the consideration was personal at the prosecutor's and investigators' levels. Public policy was a pretext.

Sloan cites and distinguishes Apply Brother v. United States, 164 F 3d 1164 (8th Cir., 1999) as to the loss of the exception when an investigation is mandatory and is not conducted. There, the inspector had discretion as to how investigate, but not as whether to investigate.

In the instant case, defendants had no discretion at all as not to use the investigatory and judicial criminal process to persecute and prosecute plaintiff for personal reasons, no discretion to spoliate evidence, no discretion to fabricate evidence, no discretion to hide evidence, no discretion to prosecute plaintiff's wife to coerce her into testifying against him, no discretion to use the media to foster their private agenda and no discretion to use the power of their federal offices, abusively.

What is unavailable to the federal prosecutor as a matter of law cannot be available to lesser officials and officials that do not bear the weight of determining wether.

39. Defendants' conduct in the against plaintiff Nogueras, his wife and daughter can be conservatively described as "gruesome" and in total disregard of their legal, constitutional and moral rights intentionally and due to what has been termed as selective, vindictive and specifically "demagogic prosecution".

Said prosecution served the ill-purpose of personal and vicarious vindictiveness by defendants against said plaintiff utilizing the great power of the America institutions which they are supposed to serve.

The above referred to, selective discriminatory and demagogic prosecutions constitutes abuse of the government's discretion whether or not to prosecute and violates the equal protection of the laws provision of the Fifth and/or Fourteenth Amendment of the U.S. Constitution. US v. Johnson, 577 F2d 1304; US v. Stout, 601 F2d 325, US v. Moss, 604 F2d 569.

A prosecutor's overt threat to bring charges can demonstrate actual vindictiveness and impermissible conduct. U.S. vs. De Marco, 550 F2d 1224; U.S. vs. Velsical Chem. Corp., 498 F. Supp. 1255.

40. Both the prosecutor's and FBI agent's, unfixed attitude toward the case during the early stages of the proceeding, their presentation of false or misleading information to the Grand Jury about a supposed finding of $26 million dollars' alleged financial computer transactions by plaintiff, knowing that was false, showed at least vindictive and demagogic prosecution under U.S. v. Goodwin, 457 U.S. 368.

The knowingly unwarranted show of force, the arrest of plaintiff's wife in her Orlando home, so that plaintiff's daughter would find herself without her parents while she studied at Dr. Phillips High School in Orlando, and therefore plaintiff would have the need to plead guilty of the charges, was clearly impermissible and coercive behavior U.S. v. Shakur, 560 F. Supp. 366; U.S. v. Litton Sys., 573 F 2d 195; U.S. v. Hooton, 662 F2d 628. Blackledge v. Perry, 417 U.S. 21; U.S. v. P.H.E. Inc., 965 F 2d 848.

All of the conduct plaintiffs have charged defendants' with, has been considered as "demagogic prosecution", revealing, as the Court's Order of June 26th, 1999 really expressed a prosecution that should have never been initiated, "trumped up" charges, bad faith, malice and evil intent, personal vendetta, political crusade, and coercive or retaliatory prosecution, or prosecution motivated by a desire for personal or political gain. The U.S. Supreme Court, has referred to said prosecutions, as "official lawlessness". Younger v. Harris, 401 U.S. 37 (1971), P. 56 (concurring opinion). See also: Farmer v. Sherrod, U.S. Dist. Lexis 5526 (N.D. Tex 1993); PHE Inc. v. Department of Justice, 743 F. Supp. 15 (D.D.C. 1990); Pizzolato v. Pérez, 524 F. Supp. 914 (E.D. La. 1981); Lenske v. U.S., 383 F 2d 20; Jennings v. Shuman, 567 F 2d 1213; Shaw v. Garrison, 467 F 2d 113; Maddox v. Ford, 818 F 2d 1058.

41. We must remind that the Orders by Judge Cerezo and the Motion by Attorney Gil in Response to the Order issued upon the request for dismissal, specifically indicate that Attorney Gil said that he was "lost in space", that he alleged no knowledge about the appeal, and that Judge Cerezo specifically identified instances in the record which specifically controverted such manifestation. If the US Attorney "did not know" about the existence of such records, then somebody must have "hidden" them, although knowledge of the existence of the letter of appeal was obvious from the face of the record submitted as evidence to the court. "Who" is responsible of both hiding this from USA Attorney Gil and for destroying and disappearing Nogueras IRS records is a matter that must be fully addressed and disclosed through appropriate discovery procedures.

The above is respectfully submitted as a hypothetical set

of circumstances, it is our contention that US Attorney Gil actively participated in the destruction and exclusion of the exculpatory evidence from the Grand Jury proceedings and further fostered their effect until advanced trial stages to destroy Nogueras' reputation and public image. A successful prosecution was never an objective in this case.

42. Although the statement and irregularities that were alleged as to the First Grand Jury we fail to see how it is that the co-defendants United States is able to separate the two. They have not. The 24 million dollar statement in the First Grand Jury is the same, "information" which agent Johnson purports to have extracted from Nicolás Nogueras' computer. It is obvious that such transaction had a bearing on the Grand Jury's will and conscience to indict. There is no indication that this 26 million dollar transaction was not amongst the "information" that was characterized as coming from Noguera's personal computer, which was referred to the indicting Grand Jury. As explained before; agent Johnson knew that such information was false because such computer was unable to transfer monies electronically and was put there by an associate in a matter completely unrelated to Plaintiff Nogueras. However Agent Johnson failed to explain it to this Grand Jury, thereby accepting and promoting any mis-characterization by the Grand Jury. Such matter must adequately be addressed as well through the appropriate discovery procedures.

43. The indictment was predicate on the notion that plaintiff Nogueras had deviced a bank transaction which conveniently allowed him to bypass certain filing and reporting requirements. The United States cannot shield itself from responsibility because the Grand Jury made the connection. Agent Johnson and United States Attorney Gil it left the elements there,

unexplained, for the connection to be made. This is particularly important due to the serious implications of the allegations in the indictment and the information available for review by the Grand Jury.

Finally, the First Grand Jury was instrumental in the sense of the information sought and acquired through subpoenas was specifically geared and designed towards representing as illegal an otherwise perfectly legal chain of events.

44. Let us not forget that the United States has still yet to explain why was it is that Nogueras letter of appeal to the tax assessment was not available for review even though all indications suggested that such appeal had been filed and that Nogueras did not "owe" as a matter of fact such monies. Thereby destroying the United States proposed assumption in this proceedings that Mr. Nogueras was however "indictable" because he owned the tax assessment. This is the real issue that denotes and exposes the contumacious intent of the United States and its employees to seek a prosecution against Nogueras to destroy his reputation, political standing, and his senate position.

Without this presumption it is impossible to conclude, as it would have been impossible for any Grand Jury reviewing the matter, that Nogueras had avoided paying an assessment that he did not owe and structured a bank transaction to avoid yearly reporting requirements that he had not to fulfill. The premise being flawed it is inevitable that a wrong conclusion would be reached.

45. For all of the above reasons, facts and doctrines the United States should not be allowed to "slip away" from this proceedings because it was the Second and not the First Grand Jury, which indicted Nogueras. What is true is that the whole scheme was instrumental in forwarding an inherently

unconstitutional plan for an illegal prosecution.

Qualified immunity is immunity from trial for a suit against a government official who was exercised a discretionary function that violated a constitutional right that at the time that such action was taken, was not clearly defined. Mitchell v. Forsyth 472 US 511 p. 524, 530 (1985). This is the protection that is afforded to the government official to ensure his vigorous performance of office, where no risk for vexatious litigation exists, as the officer's zeal for conducting such office may drive him to disregard for constitutionally protected rights. Mitchell at p. 520 (1985). In any event, the federal officials who seek exemption from personal liability must bear the burden of showing that public office requires an exemption of that scope. Clearinger v. Saxner 474 US 193, p. 201 (1985).

As such a determination comes from the nature of the action alleged as unconstitutional the Court must then consider:

a) the need to assure that the individual can perform his functions without harassment or intimidation;

b) the presence of safeguards that reduce the need for private damages action as a means to control unconstitutional conduct;

c) insulation from political influence;

d) the importance of precendent;

e) the adversary nature of the process;

f) the correctability of the error on appeal.

Butz v. Economou 438 US 478, p. 512 (1978), Clearinger, at p. 202

46. Even with qualified immunity we fail to see the justification of defendant's actions as discretionary functions; necessary for a vigorous performance of his official authority, Butz v. Economou, supra, or how was their conduct justified by the

requirements of their office or arising from unclear constitutional rights of which a reasonable person should have known. Harlow v. Fitzgerald 457 US 800, (1982), Davis v. Scherer, 468 US 183, p. 190-197 (1984). Not all judgments are covered under the discretionary function exception as claims that arise from the manner in which a certain or particular situation is handled upon the application of government policy are not covered. Liuzzo v. US 508 F. Supp. 923 (1981).

The rule of qualified immunity allows an official the expectancy that his actions will not expose him to civil liability inasmuch as they are undertaken within the boundaries of well contoured constitutional rights that are sufficiently clear to any reasonable individual. The qualified immunity protection is granted only when those rights fall within that penumbra of rights which are be objectively recognized to all individuals. Anderson v. Creighton, 483 US 635, p. 638 (1987).

47. Even in the most aggresive of criminal investigations, the accused is entitled to due process of law in the preservation of exculpatory or contestable evidence, such as an IRS Tax File. That the Fifth Amendment protects an individual against the enforcement of any law without the due process of law should hold as an uncontested matter. It should be uncontested as well that after Brady v. Maryland, 373 US 83 (1963) that same due process clause requires that all exculpatory evidence, or evidence that could reasonably lead to the discovery of such, be provided to defendant as part of the criminal proceedings, with the revocation of the conviction as deterrent for failure. United States v. Bagley,

473 US 667 (1985). Even more, when exculpatory evidence is present, the sanction proceeds regardless of the prosecuting attorney's bad or good faith as to the failure of providing the evidence. Arizona v. Youngblood 448 US 51 (1988). These are consummate and established law of the land and are within defendant officers day- to-day activities. In Davis v. Passman, 442 U.S. 228, 242 (1979), the Supreme Court held that federal officers could be sued for damages based on violations of the Fifth Amendment. To assess such a violation the particular body of law governing the constitutional disposition, in this case the Fifth Amendment, should direct the effort of analysis. Albright v. Oliver, 510 U.S. 266, p.273 (1994).

48. If the effects of such procedural doctrines and requirements are well founded, as well as known, the defendants actions to circumvent them are nothing short of intentional. Such is the rationale behind Bivens v. Six Unknown Federal Agents, 403 US 388 (1971). A suit would not unduly tax the officer's conscience in conducting personnel policy if sound employment and personnel practices are conducted but will rather encourage him to follow such established procedures equally for all employees. Therefore an analysis of whether Nogueras' right to be accused without the introduction of spurious evidence to the Grand Jury, and to be convicted without the vexatious destruction of documentary and exculpatory evidence, necessarily fall within that penumbra of constitutional rights that Bivens claims seek to protect. Therefore the operative inquiry of whether a

constitutional right is at stake is evident. It is also evident, in light of the above paragraph, that those rights were sufficiently defined so as to warrant the conclusion that a reasonable officer would not have acted to violate them. Saucier v. Katz 533 US 194 (2001) Part II. Thirdly, this claims do not arise from a discretionary function, the above rulings clearly establish a deterrent rule against the destruction of exculpatory evidence and the misleading of a Federal Grand Jury through false representations. Saucier Part III, See Docket 83 Report and Recomendation.

49. The Court seeks to protect the relentless pursuance of an Indictment with immunity protection, but not the unconstitutional pursuance of one Wright v. United States 719 F 2d 1032 (9th Cir. 1983), absent the proper checks and balances and prospect of professional ethical liability. Malley v. Briggs, 475 US 335 (1996). The Supreme Court explicitly rejected the notion that qualified immunity existed where there was clear knowledge that constitutional rights were being violated. The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the law. Butz v Economou, 438 US 478, p. 485 (1978). It is improper to immunize a defendant only because the nature of his office and the extent of his authority causes him to be successful as to the return of a Grand Jury Indictment. Harris v. Roderick 126 F3d 1189, 1198 (9th Cir. 1997). A Grand Jury indictment obtained under fraud and perjured testimony should not be sufficient to establish cause. Crow v. US 634 Fsupp. 1085 (D. Kan. 1986).

> "The purpose of immunity, qualified or absolute is not to protect erring [governmental] officials from the consequences of their injurious acts, but to safeguard the public interest in having responsible governmental employees faithfully carry out their duties, without fear of protracted litigation in unfounded damage suits. In obvious tension with that objective is that well-founded damage suits promote the public interest in compensating victims and deterring unlawful conduct." Aversa v. United States 99 F3d 1200, 1203 (1st Cir. 1996) citations omitted, emphasis supplied.

Such minimal concern will be the standard applied in the discretionary function test, in which at least observance of the law and procedural requirements is required. Hatahley v. United States, 350 US 61 (1955). Neither does the exception operate when an obligatory rule is broken within the exercise of the discretionary function. Jayvee Brand Inc. v. United States 721 F 2d 385 (D.C. Cir. 1983). An automatic application of a thoroughly explained rule is not protected as a discretionary function. Hendry v. United States, 418 F2d 774 (2nd cir. 1983).

50. For the exception to be applicable, the challenged conduct must involve a matter of choice or judgment for the acting employee. If a federal statute, regulation, or policy mandates a course of action, there is no choice or discretion

on the part of the acting employee, and the exception does not apply. Starrett v. United States 847 F 2d 539 (9th Cir. 1988) . Negligence connected with public firefighting, regarded as discretionary governmental activity under the traditional view, is not within the discretionary function of the Tort Claims Act. Rayonier v United States 352 US 315 (1957). Whenever a standard exists within which a government official's actions might be measured, then the action which depart from the discretionary function category, regardless of whoever performed the action, are excluded from qualified immunity protection. Miller v. United States 710 F2d 656 (10th Cir. 1983); Payton v. United States 679 F 2d 475 (5th cir. 1982).

The exercise of judgment which the exemption protects must be the one which would otherwise involve courts in making a decision entrusted to other branches of the government. If a decision, however, does not involve policy choices there is really no reason for a court to refrain from passing judgment on the question whether the statutory or regulatory mandate has been complied with. Canadian Transport Co. v. United States 663 F2d 1081 (DC Cir. 1980). Such distinction has been held to exclude the "day-to-day activities of persons not engaged in determining the general nature of the Government's business." Schindler v. United States, 661 F2d 552, 555 (6th Cir. 1981); Reminga v. United States, 631 F2d 456 (6th Cir. 1980). Therefore, the exception is limited to those situations in which an employee is making decisions exercising a quasi-judicial or quasi-legislative

function. Downs v. United States 522 F2d 970 (6th Cir. 1975).

51. The discretionary functions of an officer do not spread backwards to justify everything they touch merely because they were executed under office. Guzman v. Rivera Cruz, 55 F3d 26 (1st Cir. 1995) Even the decision to investigate may be employed abusively giving rise to a §1983 cause of action. Rackovich v. Wade 819 F2d 1393, Matzker v. Herr 748 F2d 1142. See Harlow v Fitzgerald 457 US 800.

When filtering such a claim through the seams of qualified immunity a court must examine wether the public official acted discretionaly upon an unclear constitutional right. However such immunity does not protect a public official when the official should have known that his conduct violated the right of the plaintiff, González-González v. Zayas 878 F2d 1500, or it was reasonably apparent that such conduct would very likely do so. Germany v. Vance 868 F2d9.

52. The fact that the grand jury found probable cause to arrest does not eliminate the fact that such finding was a result of a conspiracy between several government agents who acted "under color of law

RESPECTFULLLY SUBMITTED.

I HEREBY CERTIFY: that on this same date I have sent by regular mail a true copy of the foregoing document to: Mattew Zables, Esq., United States Department of Justice, P.O. Box 888 Benjamin Franklin Station, Washington DC 20044; Cary M. Feldman, Feldesman, Tucker, Leifer, Fidell & Bank, 2001 L Street N.W. Second Floor Washington DC 20036, María B Maldonado

Malfregeot, Lasa Monroig & Veve, Buchanan Office Center, 40 Road 165, Suite 304, Guaynabo Pr 00968-8001; and Charles De Monaco, Esq., Dickie, McCamey & Chicote, P.C., Two PPG Place – Suite 400, Pittsburgh, PA 15222-5402.

In San Juan, Puerto Rico, October 18, 2002

NICOLAS NOGUERAS, JR.
P.O. Box 195386
San Juan, P.R. 00919-5386
USDC. #109712
Tel. 296-1958

By:[signed]
ARMANDO PORRATA-DORIA HARDING

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NICOLAS NOGUERAS-CARTAGENA, ABIGAIL MOJICA ESCOBAR NICOLLE NOGUERAS-MOJICA; BERTA CARTAGENA, DANIEL MOJICA VS. UNITED STATES OF AMERICA; GUILLERMO GIL BONAR, JORGE VEGA PACHECO, JOHN JOHNSON, JOSE E. GONZALEZ Defendants	CIVIL NO. 00-1778(DRN) TORT CLAIMS ACT CONSTITUTIONAL TORT VIOLATION OF CONSTITUTIONAL RIGHTS "RECEIVED & FILED 00 OCT 18 PM 1:39 CLERK'S OFFICE U.S. DISTRICT COURT SAN JUAN PR"

AMENDED COMPLAINT

Comes now the Plaintiffs, Nicolás Nogueras, pro se, and through the undersigned attorneys, and Abigail Mojica Escobar, Nicolle Nogueras, Berta Cartagena through the

undersigned attorneys, and respectfully state, allege, and pray as follows:

JURISDICTION AND VENUE

1. This Honorable Court has jurisdiction over the present matter under 28 USC 1346(b)(1), in that this action arises under the Federal Tort Claims Act, 28 USC Chapter 171, and the requisite imposed by 28 USC 2675 has been met. Plaintiffs filed an Administrative Claim pursuant to 28 USC Sec. 2675 on December 27, 2000. The agencies did not answer the claim or make a final disposition ofn the same, and the established six months period elapsed. Venue is proper under 28 USC Sec. 1391(b), since the events giving rise to the claims occurred in Puerto Rico. Jurisdiction is also invoked under the provisions of the Constitution and Laws of the United States, Art. III, Sec. 2, 28 USC Sec. 1331 (a), being an action arising under said Constitution and laws, and brought against the United States, an agency thereof, and officers or employees thereof in their official and personal capacity. It also involves the deprivation of Plaintiff's rights to due process of law, equal protection of the laws and the pursuit of her their liberty, property, profession and freedom of speech and association.

PARTIES

2. Plaintiff, Nicolás Nogueras Cartagena, is a practicing attorney, and a member in good standing of the Bar of the Commonwealth of Puerto Rico, and is also a practicing attorney before the United States District Court of Puerto

Rico and the United States Circuit Court of Appeals for the First Circuit. Said Plaintiff at the time of the events of this Complaint had been a member of the Senate of Puerto Rico during 20 years and had been majority leader, minority leader, Committee President and Vice President of the Senate at the time of his, and his wife, Plaintiff Abigail Mojica's, arrest. He was wrongfully investigated detained and criminally prosecuted in the United States District Court for Puerto Rico due to defendants conduct as more fully described herein, which caused the serious emotional distress, anguish and damages claimed for in this action.

3. Plaintiff, Abigail Mojica Escobar, at all material time herein has been Plaintiff Nicolás Nogueras Cartagena's wife, housewife, former Customer Services Agent for several airlines, a veteran honorably discharged from the United States Army, a Hotel Marketing Director and a Realtor residing in Orlando, Florida since 1993, and has enjoyed up to the events herein described, an impeccable and high reputation in her community. She was wrongfully investigated detained and criminally prosecuted in the United States District Court for Puerto Rico due to defendants conduct as more fully described herein, which caused the serious emotional distress, anguish and damages claimed for in this action.

4. Plaintiff, Nicolle Nogueras Mojica, is the daughter of the above referred Plaintiffs and at the time of the material events herein, was a student at Doctor Phillips High School

and later at Rollins College, at Orlando, Florida, also residing in said city and state. She lived with her father and mother their ordeal, which caused serious emotional distress and mental anguish to her. At the time of her mother's arrest she was living alone with her.

5. Plaintiff, Berta Cartagena is the mother of Plaintiff Nicolás Nogueras Cartagena. Said Plaintiff is a 85 years old lady, who lived with her son and daughter in law their ordeal, which inflicted serious emotional distress and caused serious mental aguish and physical damages to her.

6. Plaintiff Daniel Mojica is the father of Plaintiff, Abigail Mojica Escobar. Said Plaintiff is a 87 years old gentleman who lived with his daughter and son in law their ordeal, which inflicted serious emotional distress and caused serious mental anguish and physical damages to her.

7. Defendant United States of America is liable for money damages to plaintiffs for the injuries caused by the intentional and/or tortious and/or negligent acts and omissions of its agents acting in their official capacities as employees of the IRS and FBI, as investigative and law enforcement officers within the meaning of 28 USC 2680(h), while they engaged in investigative and law enforcement activities in executing a search, seizing evidence, and making an arrest, all acts undertaken to complete criminal prosecution, as happened here. Upon enactment of 2680(h) Congress' invent was to provide a remedy against the federal government for innocent victims of federal law enforcement abuses. In this

particular case the agents were Ronald Mckeever, José E. González and Jorge Manrique from the IRS and John Johnson from the FBI, Guillermo Gil Bonar, United States Attorney and Jorge Vega Pacheco, Assistant US Attorney.

FACTS

The Complaint constitutes claims against the United States of America. United States Attorney Guillermo Gil Bonar Assistent US Attorney Jorge Vega Pacheco, FBI Agent John Johnson, and IRS Agent José E. González, pursuant to the Federal Tort Claims Act, and a Constitutional Tort and negligence action under the US Constitution and federal law, of Nicolás Nogueras Cartagena, Abigaíl Mojica Escobar, Berta Cartagena, Nicolle Nogueras Mojica and Daniel Mojica Medina. The herein attorney, Nicolás Nogueras Cartagena appears on his own behalf, pro se, and as attorney at law to the other named persons.

1. On April 24, 1996, an Indictment was filed by the US Attorney, for the district of Puerto Rico, charging Plaintiffs, of the following offenses: Conspiracy to defraud the United States; aid and abet; Graft and conflict of interest-bribery, structuring transactions to evade reporting requirements and statements or entries generally. All in violation of Title 18, United States Code, Section 371, Section 207 (a), Section 1001 and Section 2; Title 31, United States Code, Section 5324(a)(3).

2. Plaintiff Nicolás Nogueras' wife, Plaintiff Abigail Mojica Escobar, was charged with the following offenses:

Conspiracy to defraud the United States; Aid and abet; structuring transactions to evade reporting requirements. All in violation to Title 18, United States Code, Section 371 and Section 2, Title 31, United States Code, Section 5324(a)(3). The IRS and FBI Agent appeared before two grand juries and submitted incomplete and erroneous evidence, which resulted in the indictment against Plaintiffs Nicolás Nogueras Cartagena, Abígail Mójica Escobar and José Torres Dueño, in Criminal Case 96-0104.

3. Agents of the IRS and of the FBI, as well as the United States attorneys, appeared before two grand juries and submitted, false, and erroneous information which produced an indictment in Criminal Case 96-0104 in the United States District Court for the District of Puerto Rico. Said agents knew or should have known of the misleading false and erroneous nature of said information, concealing that fact from the Grand Jury, together with the co-defendants US Attorney and Assistant US Attorney. Agent John Johnson, of the FBI had in the first Grand Jury Panel his consensual wife with whom he discussed matters relative to his testimony, inquired of the jurors reactions to the same and spoke in a derogatory manner to said consensual wife about Nicolás Nogueras Cartagena. Said Agent also led the Grand Jury to believe that Mr. Nogueras had transferred through his computer in the Senate $26 millions dollars to off-shore banks, which he knew was false.

4. On April 24, 1996, Mr. Nogueras and Mrs. Mojica were arrested publicly by IRS and FBI agents, at their respective residences in Puerto Rico and Orlando, Florida, with an unusual display of force including a large number of agents with rifles, and other arms.

5. At the time of said arrest in which US Attorney summoned the press in advance, Mr. Nogueras was arrested without a warrant of arrest for over an hour in his neighborhood by said agents until the warrant of arrest came at which time he was handcuffed and taken into an FBI car to Federal Court, all in front of numerous persons and members of the press, all of which was transmitted live to all of Puerto Rico.

At the same time of Mr. Nogueras arrest, Mrs. Mojica was also arrested in Orlando, at her residence, in the same manner and taken to a jail in Tampa.

6. Also, Miss. Nicolle Nogueras, daughter of Mr. Nogueras and Mrs. Mojica was informed by two agents of the FBI who went to her high school in Orlando, that her parents had been arrested. Miss. Nogueras almost fainted became anxious, terrorized and completely lost, bewildered and shocked. Plaintiffs Nogueras' mother and plaintiff Abigail Mójica's father were also greatly shocked, anxious, lost, bewildered and terrorized, and their blood and sugar levels rose dangerously, almost fainting the two of then, and each had to be put under sedatives and secluded in their rooms at their respective homes, while their other relatives, friends and

neighbors kept calling and visiting them shocked and alarmed.

7. Trial started, three years after, on May 11, 1999.

8. At the very outset of the trial, IRS agents like Mr. Ronald Mckeever, incurred in false statements and misrepresentations that provoked several interventions by the US District Judge, Carmen Consuelo Cerezo, and furthermore, the alleged facts presented were incomplete, insufficient and plainly incorrect and false. Said agents also admitted that many important records necessary for Mr. Nogueras defense had been destroyed.

9. On June 22, 1999, before the third government witness was called to testify the US Attorney formally requested dismissal of all charges, with prejudice, to which all defendants consented. The US Attorney had already requested a continuance to verify information which he described as shocking, concerning the possibility that an appeal had been filed protesting the 100% penalty imposed by the IRS on codefendant Nogueras Cartagena. The following day the US Attorney formally requested dismissal of all charges with prejudice. He made reference to the appeal filed by Mr. Nogueras Cartagena, which had been kept in a revenue officer's personal file. This was of utmost importance because the prosecution was based on the fact that Mr. Nogueras Cartagena never challenged or appealed the debt. Thus, the alleged facts in the indictment were incomplete, insufficient and plainly incorrect. This was due primarily to

the negligent handling of the case file and appeal papers by IRS and FBI agents, who were grossly negligent in their performance and duties as investigated and law enforcement officers and to the gross negligence of co-defendant US and AUS attorney in the investigation and the handling of the case.

Included herein and made a part hereof is an Order dated June 25, 1999 by US District Judge Carmen Consuelo Cerezo and another order of said Judge, dated July 9th, 1999, which are self explanatory and applicable to the herein claim for damages.

Co-defendants, Guillermo Gil Bonar, John Johnson, Jorge E. Vega Pacheco, and José González are also sued in the individual or official capacity and because of their negligent and/or intentional conduct in the investigation and all stages of the federal case, against Plaintiffs, Nicolás Nogueras and Abigail Mójica Escobar, which eventually became criminal case 96-0104 in the United States Court for Puerto Rico, and because of their violation of the constitutional rights of Plaintiffs under the First, Fourth, Fifth and Fourteenth amendments of the United States Constitution.

10. On June 22, 1999 the US Attorney formally requested dismissal of all charges, with prejudice. Attached as Exhibits I and II are the Orders issued by Hon. Judge Vargas de Cerezo dismissing all charges were such findings of fact and conclusions were made. The said exhibits orders

dated June 25th and July 9th, 1999 respectively, are made a part hereof.

11. The negligence and illegal and unconstitutional conduct of individual defendants above mentioned has been adjudicated in the above referred to orders of the Court adopted and made a part hereof.

12. All co-defendants acted in furtherance of their conspiracy against Plaintiffs and/or failed to aid in prevention of the wrong against Plaintiffs that they had knowledge was about to be committed or about to occur and had the power to prevent the same.

13. Defendants deprived plaintiffs of their right to equal protection of the laws, to due process and to their life, liberty, property and to pursue their profession and livelihood, and the right to freedom of speech and association.

14. It is expressly alleged that, in the alternative, co-defendant federal officers acted outside the scope of their statutory authority and discretion or in their individual capacity, or in their official capacity in violation of clearly established constitutional and statutory rights, abovementioned.

15. All co-defendant federal officers acted negligently or, in the alternative in wilful disregard of their duties , committing intentional tort as such officers, against plaintiffs.

16. Plaintiff Nicolás Nogueras Cartagena's image as senator, attorney at law, and as a person in his community was greatly tarnished as well as his wife and daughter's

impeccable reputation. Defendants' conduct caused plaintiffs loss of enjoyment of life, emotional distress, mental and emotional anguish, humiliation, post traumatic stress disorder anxiety and depression. Also, as a result of defendant's conduct Plaintiff developed an illness known as "lupus" which has gravely harmed him physically therefore aversely affecting his life, deteriorating gravely his health and life expectancy.

FIRST CAUSE OF ACTION AGAINST DEFENDANT THE UNITED STATES OF AMERICA

1. Plaintiff Mr. Nicolás Nogueras Cartagena and Abigaíl Mójica Escobar, adopt and make a part hereof, all the herein-above statements;

2. Plaintiffs Nicolás Nogueras Cartagena, Abigaíl Mójica Escobar sustained serious emotional and mental anguish and physical damages as abovestated, as a result of theintentional and/or negligent infliction of emotional distress by government agents in subjecting him to a criminal procedure and trial only because said federal agents were derelict and extremely negligent in the investigation verification and handling of files and evidence. This conduct and public humiliation caused Plaintiffs damages as stated above, which are reasonably estimated to be $10 million dollars each.

SECOND CAUSE OF ACTION AGAINST DEFENDANT THE UNITED STATES OF AMERICA

1. Plaintiff Nicolle Nogueras Mójica adopt and make a part hereof, all the hereinabove statement. At the time of the start of the above described events shw was 17 years old and a High School Student.

2. Plaintiff Nicolle Nogueras Mójica lived fully her father and mother's ordeal and suffering. This events created in her a change in attitudes and goals as a person and as a student which had to be deal with; subjected her to humiliation at her school, community and neighborhood, as well as her relations with friends; altered her personal, family and social life; developed in her post traumatic stress disorder, as well as inflicted in her severe emotional distress, anxiety and depression, insomnia, loss of appetite and nervousness and loss of enjoyment of life.

Her personal emotional and other damages are reasonably calculated to be $5 million dollars.

THIRD CAUSE OF ACTION AGAINST DEFENDANT UNITED STATES OF AMERICA

1. Plaintiff Berta Cartagena adopts and make a part hereof, all the hereinabove statement.

2. Plaintiff Berta Cartagena profoundly suffered emotionally her son and daughter in law's ordeal, felt humiliated, and was exposed to continuos negative comments

against them by other persons and the news media. She not only suffered the happening of the events but also her son, daughter in law and granddaughter's emotional sufferings.

This Plaintiff suffered the following damages: physical and mental damages, post-traumatic stress disorder, loss of enjoyment of life, aggravation of her cardiac problems and on her diabetes, and deterioration of her health, continues suffering, anxiety, depression and nervousness, Mrs. Nogueras is an 85 years old lady — $1 million dollars

THIRD CAUSE OF ACTION AGAINST DEFENDANT UNITED STATES OF AMERICA

1. Daniel Mojica adopt and make a part hereof, all the hereinabove statement.

2. Plaintiff Daniel Mojica profoundly suffered emotionally his daughter and son in law's ordeal, felt humiliated, and was exposed to continuos negative comments against them by other persons and the news media. He not only suffered the happening of the events but also his daughter, son in law and granddaughter's emotional sufferings.

This Plaintiff suffered the following damages: physical and mental damages, post-traumatic stress disorder, loss of enjoyment of life, deterioration of his health, continued suffering, nervousness, anxiety and depression, Mr. Mojica is a 87 years old gentlemen — $1 million dollars

FIFTH CAUSE OF ACTION AGAINST ALL OTHER CO-DEFENDANTS
NOT THE UNITED STATES OF AMERICA

1. All Plaintiffs adopt and make a part hereof, all the abovementioned statements;

2. This cause of action is in addition to, and independent and separate from the above causes of action against the United States of America.

3. Defendants John Johnson, FSI Agent, José González, IRS Agent, Guillermo Gil Bonar, US Attorney and Jorge Vega Pacheco, Assistant US Attorney, as a result of therein. Negligence and/or their negligent and/or intentional infliction of emotional distress as government agents, against Plaintiff, subjecting plaintiffs Nicolás Nogueras Cartagena and Abigaíl Mójica Escobar to a criminal procedure and trial only because said federal agents were derelict and extremely negligent in their investigation, verification and handling of files and evidence, and as result of this conduct as more fully herein described are personally liable to each Plaintiff for the same damages and amounts more fully hereinfore described in Plaintiffs' causes of action against the United States of America.

4. Each plaintiff, as federal officers and agents, by engaging in their negligent and/or intentional conduct mentioned in the above statement of facts have: (1) violated Plaintiffs substantive due process, under Aversa v. United

States of America, et als 99 F3rd 1200 (1st Cir. 1996); (2) violated plaintiffs Nicolás Nogueras and Abigaíl Mójica's right to be free from any unreasonable search and seizure, as a result of their arrest pursuant to a warrant predicated on false information by government agents, under Calero-Colón, et als v. Betancourt Lebrón, 68 F3d 1 (1st Cir. 1995) (3) intentionally or negligently inflicted emotional distress on all Plaintiffs, under Santiago Ramírez v. Secretary of Defense, 984 F 2d 16 (1st Cir. 1993) and (4) violated clearly established statutory and constitutional rights of which a reasonabl eperson would have known (López v. Arán, 600 F. Supp. 323, (DPR 1984), (4) made an improper use of process for an immediate purpose other than that for which it was designated and intended (Simons v. Navons, 71 F 3d 9 (1st Cir. 1995).

5. Plaintiff's substantive due process was violated by co-defendants by her deprivation by them of her life, liberty and property protected by the Fifth Amendment, and their conduct, "shocks the conscience. "(Aversa v. United States of America, et al, 99 F3d 1200.

6. All defendants have occasioned Plaintiff, intentional or negligent emotional distress by their aforementioned conduct. (Santiago Ramirez v. Secretary of Defense, 984 F2d 16 (1st Cir. 1995).

7. Plaintiff's Fourth Amendment right to be free from any unreasonable search and seizure has been violated by defendants, who obtained Plaintiffs arrest pursuant to a warrant predicated on said defendants false allegations.

(Calero Colón, et al v. Betancourt Lebron, 68 F3d 1 (1st Cir. 1995)

8. All co-defendants acted in furtherance of their conspiracy against Plaintiff and/or failed to aid in prevention of the wrong against plaintiff that they had knowledge was about to be committed or about to occur and had the power to prevent the same.

9. Defendants deprived plaintiff of her right to equal protection of the laws, to due process and to her life, liberty, property and to pursue her profession and livelihood.

10. It is expressly alleged that, in the alternative, co-defendant federal officers acted outside the scope of their statutory authority and discretion or in their individual capacity, or in their official capacity in violation of clearly established constitutional and statutory rights, abovementioned.

11. All co-defendant federal officers acted negligently, or, in the alternative in wilful disregard of their duties and/or intentionally, committing intentional tort as such officers, against plaintiff, violating clearly established statutory or constitutional rights of Plaintffs of which a reasonable person would have known (López v. Arán, 600 F Supp. 323 (DPR 1984).

12. Plaintiff's damages were caused by the negligent actions and/or omissions, and/or wrongful acts of federal employees while acting within the scope of their office or employment, and/or outside said scope.

13. Plaintiffs expressly requests trial by jury.

WHEREFORE, plaintiffs, demands judgment against defendants in this case for the above stated amount of money, for compensatory damages and cost and attorney's fees.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 18 day of October, 2000.

NICOLAS NOGUERAS, JR., ESQ.
FRANCISCO LOPEZ ROMO, ESQ.
FERNANDO CARLO, ESQ.
Wilson Street 1309
Condado PR 00907
Te. 722-6263

[signed]
NICOLAS NOGUERAS, JR.
USDC: 109712

Docket as of July 31, 2003 8:34 pm web PACER (v2.4)

U.S. District Court
Puerto Rico (San Juan)

CIVIL DOCKET FOR CASE #: 00-CV-1778

Nogueras-Cartagena, et al v. United States, et al

Filed: 06/21/00
Assigned to: Judge Daniel R. Dominguez
Jury demand: Plaintiff
Demand: $9,999,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: US Defendant
Dkt# in other court: None
Cause: 28:2671 Federal Tort Claims Act

NICOLAS NOGUERAS-CARTAGENA, Nicolas Nogueras-Cartagena
Senator
plaintiff

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San Juan, PR 00919-5386
787-296-1958

ABIGAIL MOJICA-ESCOBAR
Nogueras-Cartagena
plaintiff

Nicolas
(See above)
[COR LD NTC]

NICOLLE NOGUERAS-MOJICA
Nogueras-Cartagena
plaintiff

Nicolas
(See above)
[COR LD NTC]

BERTA CARTAGENA
Nogueras-Cartagena
plaintiff

Nicolas
(See above)
[COR LD NTC]

DANIEL MOJICA
Nogueras-Cartagena
plaintiff

Nicolas
(See above)
[COR LD NTC]

ALL PLAINTIFFS
Nogueras-Cartagena
plaintiff

Nicolas
(See above)
[COR LD NTC]

Armando Porrata-Doria

787-772-4605
[COR LD NTC]
P.O. Box 195386
San Juan, PR 00919-5386
787-296-1958

v.

UNITED STATES DEPARTMENT OF
JUSTICE
defendant

US TREASURY DEPT.
defendant

INTERNAL REVENUE SERVICE
defendant

GUILLERMO GIL-BONAR, Hon., U.S. Attorney
defendant

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JORGE E. VEGA-PACHECO
defendant

Charles A. De-Monaco
(See above)
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JOHN JOHNSON
defendant

Maria B. Maldonado-Malfregeot
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Ruben T.

Nigaglioni

[term

06/27/02]

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McConnell

Valdes

PO Box 364225
San Juan, PR

00936-4225

Mason

Justice

20044-7146

Feldman

Tucker, [illegible],

LLP

NW

20036

JOSE E. GONZALEZ
defendant
[term 05/09/01]

USA
Zabel
defendant

787-250-5670

Mary Hampton-

[COR LD NTC]

Torts Branch
Civil Division
US Dept of

PO Box 7146
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Cary M.

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Matthew L.

[term

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08/19/02]

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U.S.

Department of Justice

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Torts Branch

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Washington, DC

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DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
6/21/00	1	COMPLAINT Filing Fee $ 150 Receipt # 109516 (np) [Entry date 06/23/00]

6/22/00 2 MOTION SUBMITTING orders to be attached to the complaint w/attachment by Nicolas Nogueras-Cartagena, Abigail Mojica-Escobar, Nicolle Nogueras-Mojica, Berta Cartagena,Daniel Mojica (np) [Entry date 06/23/00]

10/17/00 3 ORDER TO SHOW CAUSE: Response due on 10/25/00 for All. Plaintiffs why each deft should not be dism for failure to effect service of process. . (signed by Judge Daniel R. Dominguez) (np) [Entry date 10/17/00]

[Edit date 10/18/00]

10/18/00 4 AMENDED COMPLAINT by Nicolas Nogueras-Cartagena, Abigail Mojica-Escobar, Nicolle Nogueras-Mojica, Berta Cartagena, Daniel Mojica, All Plaintiffs (Answer due 10/30/00 for Jose E. Gonzalez, for John Johnson, for Jorge E. Vega-Pacheco, for Guillermo Gil-Bonar, for Internal Revenue Ser, for US Treasury Dept., for US Dept. of Justice) amending [1-1] complaint (np) [Entry date 10/19/00]

10/18/00 --	SUMMONS issued for Guillermo Gil-Bonar, Jorge E. Vega-Pacheco, John Johnson, Jose E. Gonzalez, United States Follow up by 1/16/01 . (np) [Entry date 10/19/00]
10/19/00 5	SUMMONS Returned Executed as to Guillermo Gil-Bonar, Jorge E. Vega-Pacheco, United States thru Mirna Ferrer on10/18/00 Answer due on 12/18/00 for United States, for Jorge E. Vega-Pacheco, for Guillermo Gil-Bonar (np) [Entry date 10/24/00]
10/25/00 6	MOTION by All Plaintiffs a mot for consolidation has been fld as to 00-1894 HL and to cont w/the case (np) [Entry date 10/26/00]

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

NICOLAS NGUERAS-CARTAGENA, ABIGAIL MOJICA ESCOBAR, NICOLLE NOGUERAS-MOJICA, BERTA CARTAGENA, DANIEL MOJICA vs. UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE OF THE UNITED STATES, ATTORNEY GENERAL, TREASURY DEPARTMENT OF THE UNITED STATES, INTERNAL REVENUE SERVICE, UNITED STATES OF AMERICA, GUILLERMO GIL BONAR, JORGE VEGA PACHECO, JOHN JOHNSON, JOSE E. GONZALEZ Defendants	CIVIL NUM. 00-1778 TORT CLAIMS ACT CONSTITUTIONAL TORT, VIOLATION O F CONSTITUTIONAL RIGHTS "RECEIVED & FILED (FILING DROP BOX) 00 JUN 21 PM 3:29 CLERK'S OFFICE US DISTRICT COURT SAN JUAN, PR"

COMPLAINT

Comes now the Plaintiffs, Nicolás Nogueras, pro se, and through the undersigned attorneys, and Abigail Mojica Escobar, Nicolle Nogueras, Berta Cartagena through the undersinged attorneys, and respectfully states, alleges, and prays as follows:

1. This Honorable Court has jurisdiction over the present matter under 28 USC 1346(b)(1), in that this action arises under the Federal Tort Claims Act, 28 USC Chapter 171, and the requisite imposed by 28 USC 2675 has been met. Jurisdiction is also invoked under the provisions of the Constitution and Laws of the United States, Art. III, Sec. 2, 28 USC Sec. 1331 (a), being an action arising under said Constitution and laws, and brought against the United States, an agency thereof, and officers or employees thereof in their official and personal capacity. It also involves the deprivation of Plaintiff's rights to due process of law, equal protection of the laws and the pursuit of her their liberty, property, profession and freedom of speech and association.

PARTIES

2. Plaintiff, Nicolás Nogueras Cartagena, is a practicing attorney, and a member in good standing of the Bar of the Commonwealth of Puerto Rico, and is also a practicing attorney before the United States District Court of Puerto Rico and the United States Circui Court of Appeal for the First Circuit. Said Plaintiff at the time of the events of this

Complaint had been a member of the Senate of Puerto Rico during 20 years and had been majority leader, minority leader, Committee President and Vice President of the Senate.

3. Plaintiff, Abigail Mojica Escobar, at all material time herein has been Plaintiff Nicolás Nogueras Cartagena's wife, housewife, Former Customer Services Agent for several airlines, a veteran, a Hotel Marketing Director and a Realtor residing in Orlando, Florida since 1993.

4. Plaintiff, Nicolle Nogueras Mojica, is the daughter of the above referred Plaintiffs and at the time of the material events herein was a student at Doctor Phillips High School and later at rollings college, at Orlando, Florida, also residing in said city and state.

5. Plaintiff, Berta Cartagena is the mother of Plaintiff Nicolás Nogueras Cartagena. Said Plaintiff is a 85 years old lady.

6. Plaintiff Daniel Mojica is the father of Plaintiff, Abigail Mojica Escobar. Said Plaintiff is a 87 years old gentleman.

7. Co-defendant, the United States of América, is the Federal Government of the United States, and it is liable as it would be a private individual for money damages for injury or loss of property caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their office or employment. In the instant action, the injury and loss was caused by the negligent acts and/or omissions, and/or wrongful acts of employees of its federal

agencies, to witt, the Department of Justice, Treasury Department and the Internal Revenue Service, of the United States and the United States Attorney, Guillermo Gil Bonar and Assistance US Attorney, Jorge Vega Pacheco, FBI Agent John Johnson and IRS Agent, José E. González.

8. It is expressly alleged that co-defendant Attorney General of the United States is the federal officer with ultimate powers and duties over the Department of Justice of the United States of America and co-defendants Federal Officers, Federal Bureau Investigation Agent, John Johnson and Internal Revenue Agent, José E. González, individually and personally conspired against Plaintiff, though the conduct and for the reasons more fully hereinstated, violating her legal and constitutional rights.

9. On December 27, 1999 Plaintiff filed an administrative claim against Defendants Government and Governmental Agencies, for the same fact alleged herein, pursuant to the Federal Tort Claims Act, 28 USC Chapter 171. Up to the present time said claim has not been answer.

FACTS

The Complaint constitutes claims against the Treasury Department, the Internal Revenue Service and the Department of Justice of the United States, United States Attorney Guillermo Gil Bonar Assistent US Attorney Jorge Vega Pacheco, FBI Agent John Johnson, and IRS Agent José E. González, pursuant to the Federal Tort Claims Act, and a Constitutional Tort (Brivens Claim) action under the US

Constitution of Nicolás Nogueras Cartagena, Abigail Mojica Escobar, Berta Cartagena, Nicolle Nogueras Mojica and Daniel Mojica Medina. The herein attorney, Nicolás Nogueras Cartagena appears on his own behalf, pro se, and as attorney at law to the other named persons.

1. On April 24, 1996, an Indictment was filed by the US Attorney, for the district of Puerto Rico, charging Plaintiffs, of the following offenses: Conspiracy to defraud the United States; Aid and abet; Graft and conflict of interest-bribery, structuring transactions to evade reporting requirements and statements or entries generally. All in violation of Title 18, United States Code, Section 371, Section 207 (a), Section 1001 and Section 2; Title 31, United States Code, Section 5324(a)(3).

2. Plaintiff Nicolás Nogueras' wife, Plaintiff Abigail Mojica Escobar, was charged with the following offenses: Conspiracy to defraud the United States; Aid and abet; structuring transactions to evade reporting requirements. All in violation to Title 18, United States Code, Section 371 and Section 2, Title 31, United States Code, Section 5324(a)(3).

3. Agents of the IRS and of the FBI, as well as the United States attorneys, appeared before two grand juries and submitted, false, and erroneous information which produced an indictment in Criminal Case 96-0104 in the United States District Court for the District of Puerto Rico. Said agents should have known of the misleading false and erroneous nature of said information, concealing that fact from the

Grand Jury, together with the US Attorney. Agent John Johnson, of the FBI had in the first Grand Jury Panel his consensual wife with whom he discussed matters relative to his testimony, inquired of the jurors reactions to the same and spoke in a derogatory manner to said consensual wife about Nicolás Nogueras Cartagena. Said Agent also let the Grand Jury to believe that Mr. Nogueras had transferred through his computer in the Senate $26 millions dollars to off-shore banks, which he knew was false.

4. On April 24, 1996, Mr. Nogueras and Mrs. Mojica were arrested publicly by IRS and FBI agents, at their respective residences in Puerto Rico and Orlando, Florida, with an unusual display of force including a large number of agents with rifles, and other arms.

5. At the time of said arrest in which US Attorney summoned the press in advance, Mr. Nogueras was arrested without a warrant of arrest for over an hour in his neighborhood by said agents until the warrant of arrest came at which time he was handcuffed and taken into an FBI car to Federal Court, all in front of numerous persons and members of the press, all of which was transmitted live to all of Puerto Rico.

At the same time of Mr. Nogueras arrest, Mrs. Mojica was also arrested in Orlando, at her residence, in the same manner and taken to a jail in Tampa.

6. Also, Miss. Nicolle Nogueras, daughter of Mr. Nogueras and Mrs. Mojica was informed by two agents of the

FBI who went to her high school in Orlando, that her parents had been arrested.

7. Trial started, three years after, on May 11, 1999.

8. At the very outset of the trial, IRS agents like Mr. Ronald Mckeever, incurred in false statements and misrepresentations that provoked several interventions by the US District Judge, Carmen Consuelo Cerezo, and furthermore, the alleged facts presented were incomplete, insufficient and plainly incorrect and false. Said agents also admitted that many important records necessary for Mr. Nogueras defense had been destroyed.

9. On June 22, 1999, before the third government witness was called to testify the US Attorney formally requested dismissal of all charges, with prejudice, to which all defendants consented.

Included herein and made a part hereof is an Order dated June 25, 1999 by US District Judge Carmen Consuelo Cerezo and another order of said Judge, dated July 9th, 1999, which are self explanatory and applicable to the herein claim for damages.

Co-defendants, Guillermo Gil Bonar, John Johnson, Jorge E. Vega Pacheco, and José González are also sued in the individual or official capacity and because of there negligent and/or intentional conduct in the investigation and all stages of the Federal Case, against Plaintiffs, Nicolás Nogueras and Abigail Mójica Escobar, which eventually became criminal case 96-0104 in the United States Court for

Puerto Rico, and because of their violation of the constitutional rights of Plaintiff under the First, Fourth, Fifth and Fourteen amendments of the United States Constitution.

10. The negligence and illegal and unconstitutional conduct of individual defendants above mentioned has been adjudicated in the above referred to orders of the Court adopted and made a part hereof.

11. All co-defendants acted in furtherance of their conspiracy against Plaintiffs and/or failed to aid in prevention of the wrong against Plaintiffs that they had knowledge was about to be committed or about to occur and had the power to prevent the same.

12. Defendants deprived plaintiffs of their right to equal protection of the laws, to due process and to their life, liberty, property and to pursue their profession and livelihood, and the right to freedom of speech and association.

13. It is expressly alleged that, in the alternative, co-defendant federal officers acted outside the scope of their statutory authority and discretion or in their individual capacity, or in their official capacity in violation of clearly established constitutional and statutory rights, abovementioned.

14. All co-defendant federal officers acted intentionally, or, in the alternative in wilful disregard of their duties , committing intentional tort as such officers, against plaintiffs.

CAUSE OF ACTION

Plaintiff has been de victim of selective, vindictive, and malicious prosecution and abuse of process and/or willful negligence and disregard of a rights by defendants while acting within and/or without the scope of their office or employment because of their excercise or their legal and constitutional rights.

As a direct result of the above stated actions by all Defendants, Plaintiffs received the following damages:

a. Nicolás Nogueras Cartagena: physical, emotional and mental damages, humiliation, post traumatic stress disorder, lupus, loss of business, adverse effect on his reputation and standing in the community, loss of enjoyment of life, anxiety, depression, adverse effect on his family and personal life, expulsion from the Senate of Puerto Rico and as Vice President of said legislative body — $10 million dollars;

b. Abigaíl Mojica Escobar: physical, emotional and mental damages, humiliation, post traumatic stress disorder, adverse effect on her reputation and standing in the community, loss of enjoyment of life, anxiety, depression, adverse effect on her family and personal life, — $10 million dollars;

c. Nicolle Nogueras Mojica: physical and mental damages, anxiety, depression, continued suffering, loss of enjoyment of life, adverse effect on her reputation and standing in the community, insomnia, loss of appetite, and nervousness – $5 million dollars

d. Berta Cartagena, mother of Nicolás Nogueras: physical and mental damages, post-traumatic stress disorder, loss of enjoyment of life, aggravation of her cardiac problems and on her diabetes, and deterioration of her health, continues suffering, anxiety, depression and nervousness, Mrs. Nogueras is an 85 years old lady — $1 million dollars

e. Daniel Mojica, father of Abigail Mojica: physical and mental damages, post-traumatic stress disorder, loss of enjoyment of life, deterioration of his health, continued suffering, nervousness, anxiety and depression, Mr. Mojica is a 87 years old gentlemen — $1 million dollars

15. Plaintiff's damages were caused by the negligent actions and/or omissions, and/or wrongful acts of federal employees while acting within the scope of their office or employment, and/or outside said scope.

16. Plaintiffs expressly requests trial by jury.

WHEREFORE, plaintiffs, demands judgment against defendants in this case for the above stated amount of money, for compensatory damages and cost and attorney's fees.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico this 21st day of June, 2000.

NICOLAS NOGUERAS, JR., ESQ.
FRANCISCO LOPEZ ROMO, ESQ.
FERNANDO CARLO, ESQ.
Wilson Street 1309
Condado PR 00907
Te. 722-6263

[signed]
NICOLAS NOGUERAS, JR.
USDC: 109712

December 27, 1999

Hon. Secretary of the Treasury
Of the United States of America

Hon. Commissioner Internal Revenue Service
c/o General Counsel
Treasury Department,
Washington, DC

Hon. Janet Reno
Attorney General of the United States
Department of Justice
c/o Washington, DC

Dear Sirs:

The herein letter constitutes claims against the Treasury Department, the Internal Revenue Service and the Department of Justice of the United States, pursuant to the Federal Tort Claim Act, of Nicolás Nogueras Cartagena, Abigaíl Mojica Escobar, Berta Cartagena, Nicolle Nogueras Mojica and Daniel Mojica Medina. The herein attorney, Nicolás Nogueras Cartagena appears on his own behalf, pro se, and as attorney at law to the other named persons.

On April 24, 1996, an Indictment was filed by the US Attorney, for the district of Puerto Rico, charging me, of the

following offenses: Conspiracy to defraud the United States; Aid and abet; Graft and conflict of interest-bribery, structuring transactions to evade reporting requirements and statements or entries generally. All in violation of Title 18, United States Code, Section 371, Section 207 (a), Section 1001 and Section 2; Title 31, United States Code, Section 5324(a)(3).

The herein attorney's wife, Abigail Mojica Escobar, was charged with the following offenses: Conspiracy to defraud the United States; Aid and abet; structuring transactions to evade reporting requirements. All in violation to Title 18, United States Code, Section 371 and Section 2, Title 31, United States Code, Section 5324(a)(3).

Agents of the IRS and of the FBI, as well as the United States attorneys, appeared before two grand juries and submitted, false, and erroneous information which produced an indictment in Criminal Case 96-0104 in the United States District Court for the District of Puerto Rico. Said agents should have known of the misleading false and erroneous nature of said information, concealing that fact from the Grand Jury, together with the US Attorney. Agent John Johnson, of the FBI had in the first Grand Jury Panel his consensual wife with whom he discussed matters relative to his testimony, inquired of the jurors reactions to the same and spoke in a derogatory manner to said consensual wife about Nicolás Nogueras Cartagena. Said Agent also let the Grand Jury to believe that Mr. Nogueras had transferred through his

computer in the Senate $26 millions dollars to off-shore banks, which he knew was false.

On April 24, 1996, Mr. Nogueras and Mrs. Mojica were arrested publicly by IRS and FBI agents, at their respective residences in Puerto Rico and Orlando, Florida, with an unusual display of force including a large number of agents with rifles, and other arms.

At the time of said arrest in which US Attorney summoned the press in advance, Mr. Nogueras was arrested without a warrant of arrest for over an hour in his neighborhood by said agents until the warrant of arrest came at which time he was handcuffed and taken into an FBI car to Federal Court, all in front of numerous persons and members of the press, all of which was transmitted live to all of Puerto Rico.

At the same time of Mr. Nogueras arrest, Mrs. Mojica was also arrested in Orlando, at her residence, in the same manner and taken to a jail in Tampa.

Also, Miss. Nicolle Nogueras, daughter of Mr. Nogueras and Mrs. Mojica was informed by two agents of the FBI who went to her high school in Orlando, that her parents had been arrested.

Trial started, three years after, on May 11, 1999.

At the very outset of the trial, IRS agents like Mr. Ronald

Mckeever, incurred in false statements and misrepresentations that provoked several interventions by the US District Judge, Carmen Consuelo Cerezo, and furthermore, the alleged facts presented were incomplete, insufficient and plainly incorrect and false. Said agents also admitted that many important records necessary for Mr. Nogueras defense had been destroyed.

On June 22. 1999, before the third government witness was called to testify the US Attorney formally requested dismissal of all charges, with prejudice, to which all defendants consented.

I include herein and make a part hereof an Order dated June 25, 1999 by US District Judge Carmen Consuelo Cerezo and another order of said Judge, dated July 9th, 1999, which are self explanatory and applicable to the herein claim for damages.

The present letter is a formal claim for money damages against the Department of the Treasury, the Internal Revenue Service, The Department of Justice of the United States and the United States Government, for injuries caused to herein claimants by employees of IRS and the US Department Treasury and of the Department of Justice, while acting within the scope of their office or employment, where the United States, and said departments and agencies, if they were a private persons, would be liable to the claimant in accordance with the law of the place, where the act or

omission occurred, that is, Puerto Rico.

As a result of said actions by the above agencies and their employees, claimants were caused the following damages by them:

1. Nicolás Nogueras Cartagena: physical, emotional and mental damages, humiliation, post traumatic stress disorder, lupus, loss of business, adverse effect on his reputation and standing in the community, loss of enjoyment of life, anxiety, depression, adverse effect on his family and personal life, expulsion from the Senate of Puerto Rico and as Vice President of said legislative body — $10 million dollars;

2. Abigaíl Mojica Escobar: physical, emotional and mental damages, humiliation, post traumatic stress disorder, adverse effect on her reputation and standing in the community, loss of enjoyment of life, anxiety, depression, adverse effect on her family and personal life, — $10 million dollars;

3. Nicolle Nogueras Mojica: physical and mental damages, anxiety, depression, continued suffering, loss of enjoyment of life, adverse effect on her reputation and standing in the

community, insomnia, loss of appetite, and nervousness – $5 million dollars

4. Berta Cartagena, mother of Nicolás Nogueras: physical and mental damages, post-traumatic stress disorder, loss of enjoyment of life, aggravation of her cardiac problems and on her diabetes, and deterioration of her health, continues suffering, anxiety, depression and nervousness, Mrs. Nogueras is an 85 years old lady — $1 million dollars

5. Daniel Mojica, father of Abigaíl Mojica: physical and mental damages, post-traumatic stress disorder, loss of enjoyment of life, deterioration of his health, continued suffering, nervousness, anxiety and depression, Mr. Mojica is a 87 years old gentlemen — $1 million dollars

All claimant herein request that the above money damages be paid to them as set forth.

It is my intention to sue the United States Government, said agencies and employees in the event that no settlement is made as more fully herein requested.

Very truly yours,

[signed]
Nicolás Nogueras, Jr.
pro se
and as attorney of
Mrs. Abigaíl Mojica,
Nicolle Nogueras, Daniel
Mojica and Berta Cargagena
1309 Wilson Street
Condado, PR 00907
Tel. 722-6263 / 723-5326

Washington DC 20224

Nicolas Nogueras, Jr.
Attorney at Law
1309 Wilson St.
Condado, PR 00907

Contact Person: Richard L. Schutz
Telephone Number: (202) 283-7908
In Reference to: CC: GLS
Date: October 30, 2000

CERTIFIED MAIL - RETURN RECEIPT REQUESTED
IRS CLAIM NO: 00-033
Your Client: Nicolas N. Cartagena

Dear Mr. Nogueras:

This is to inform you that your Federal Tort Claim on behalf of your client for damages which you filed against the United States has been denied.

If you wish to contest this determination, you may resubmit the claim to this office within a period of six months from the date of the mailing of this letter with a request that it be reconsidered. Such a request for reconsideration must set forth fully the basis thereof including substantiating documentation.

In the event that you are dissatisfied with this action, you may file suit in the appropriate United States district court no later than six months after the date of the mailing of this notification.

Sincerely,
[signed RICHARD L. SCHUTZ]
Richard L. Schutz
Claims Manager